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Supreme Court, U.S.
FILED

No. ____

981189 JAN 25 1999

In The

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Supreme Court of the United States

October Term, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the First Amendment is offended by a public university's creation of a non-spatial forum for the expression of diverse student speech, through its viewpoint-neutral distribution of a compulsory student activity fee to pay for costs of expressive activities, such as postage, printing, and honorariums for speakers.

(2) Whether the First Amendment is offended by a public university's funding of organizations that provide services to a significant portion of the student body through the use of a small activity fee paid by all students who choose to matriculate.

LIST OF PARTIES

Actual parties to the proceedings in the Court of Appeals were:

Michael W. Grebe, Sheldon B. Lubar, Jonathan B. Barry, John T. Benson, Brigit E. Brown, John Budzinski, Alfred S. De Simone, Lee S. Dreyfus, Daniel C. Gelatt, Kathleen J. Hempel, Ruth Marcene James, Phyllis M. Krutsch, Virginia R. Macneil, San W. Orr, Jr., Gerald A. Randall, Jr., Jay L. Smith and George K. Steil, Sr., all in their official capacities as members of the Board of Regents of the University of Wisconsin System. Michael W. Grebe, Sheldon B. Lubar, Brigit E. Brown, John Budzinski, Lee S. Dreyfus, Daniel C. Gelatt, Phyllis M. Krutsch and George K. Steil, Sr., are no longer members of the Board of Regents of the University of Wisconsin System; their positions on the Board of Regents have been filled by Patrick G. Boyle, JoAnne Brandes, Bradley D. DeBraska, Guy A. Gottschalk, Toby E. Marcovich, Frederic E. Mohs, Jose A. Olivieri and Grant E. Staszak.

Petitioners herein,

Scott Harold Southworth, Amy Schoepke, Keith Bannach, Rebecka Vander Werf, Rebecca Bretz, Kendra Fry and Jamie Fletcher.

Respondents herein.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the members of the Board of Regents of the University of Wisconsin System, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on August 10, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 151 F.3d 717 (7th Cir. 1998) (Pet.-Ap. 13a-51a). The Seventh Circuit's denial of the Petition for Rehearing, and the dissents therefrom, are reported at 157 F.3d 1124 (7th Cir. 1998) (Pet.-Ap. 1a-12a). The opinion of the United States District Court for the Western District of Wisconsin (Pet.-Ap. 78a-99a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 10, 1998. Petitioners filed a Petition for Rehearing With Suggestion of Rehearing En Banc which was denied by Order dated October 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statutes § 36.09(5) provides:

> The students of each institution or campus subject to the responsibilities and powers of the board, the president, the chancellor and the faculty shall be active participants in the immediate governance of

> and policy development for such institutions. As such, students shall have primary responsibility for the formulation and review of policies concerning student life, services and interests. Students in consultation with the chancellor and subject to the final confirmation of the board shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities. The students of each institution or campus shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance.

STATEMENT OF THE CASE

A. Background and Facts.

This case concerns the ability of public universities to fund, using a small portion of the student activity fees paid by all students who choose to matriculate, (1) a non-spatial forum consisting of resources for printing, postage, etc., provided on a viewpoint-neutral basis that enables students to present ideas and hear others on the fullest range of human interests and (2) campus organizations that provide services to a significant portion of the student body. The forum is created by using a small fraction of the fees collected from matriculating students and providing it to the student government, which then distributes those funds to registered student organizations to facilitate their organizational and expressive activities. Student involvement in the distribution of student fees that support campus activities is required pursuant to Wis. Stat. § 36.09(5) (see Stip.¶ 2, Pet.-Ap. 101a). The parties entered into a stipulation about how the process of collection and distribution of funds works and specifically stipulated that the allocations for funding were "viewpoint-neutral" (Stip. ¶ 12, Pet-Ap. 106a). With respect to the funding of student services, the parties stipulated that the services can be provided by registered student organizations, university departments or community based services, that they "provide direct, ongoing services to significant numbers of UW-Madison students" and that they "contribute

significantly to student health, safety or academic success" (Stip. ¶ 13, Pet-Ap. 106a).

On April 2, 1996, three students at the University of Wisconsin-Madison law school commenced an action for declaratory and injunctive relief against the Board of Regents of the University of Wisconsin System. As those students graduated, other students were added as plaintiffs, respondents herein. Respondents challenged the University of Wisconsin's mandatory student activity fee as compelling them to support organizations whose positions they object to, allegedly in violation of their rights of free speech, freedom of association and freedom of religion under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343(3) and (4).

The parties entered a stipulation of facts, and both sides moved for summary judgment, with the district court granting respondents' motion on the First Amendment issue and entering judgment declaring the University of Wisconsin's fee system in violation of the First Amendment. Petitioners appealed to the Seventh Circuit Court of Appeals. The first appeal was dismissed for lack of jurisdiction in an unpublished decision, 124 F.3d 205 (7th Cir. 1997), because the district court had only addressed respondents' request for declaratory relief, not their request for injunctive relief (Pet.-Ap. 66a-73a). On remand, the district court issued an injunction that set forth a detailed procedure by which the Board of Regents of the University of Wisconsin System could collect some student fees (Pet.-Ap. 61a-65a). Petitioners appealed a second time, challenging both the district court's declaratory and injunctive rulings. Respondents filed a cross-appeal on the injunction issue. The Court of Appeals modified the district court's injunction, but affirmed its principal holding that the challenged fee system violated the First Amendment. Petitioners are not seeking review of that portion of the Court of Appeals' decision addressing the injunction issue.

As noted above, the parties entered into a Stipulation of Facts before the district court concerning the amount of student activity fees paid by students at the University of Wisconsin-Madison and the procedures for distributing those fees on that

campus, including the names of the organizations that received funding for the 1995-96 school year (see Stip., Pet.-Ap. 100a-112a). The student government (the Associated Students of Madison or ASM) provides funding to registered student organizations applying for events, operations or travel grants. To qualify as a registered student organization, an organization must meet certain criteria, including, that it be (1) a not-for-profit, formalized group; (2) composed mainly of students; (3) controlled and directed by students; (4) related to student life on campus; and (5) that it abide by all nondiscrimination laws and policies (Stip. ¶ 14, Pet.-Ap. 106a-107a). Over 100 registered student groups received such funding in the 1995-96 academic year (Stip. ¶ 25, attachment c), at a cost of $4.28 per student per semester, which included the cost of supporting the student government itself (Stip. ¶ 5, Pet.-Ap. 103a). At least some respondents were members of student organizations receiving this type of funding (Bannach Depo. at 21; Schoepke Depo. at 17). The parties stipulated that "[t]he process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion" (Stip. ¶ 12, Pet.-Ap. 106a). Respondents objected to their fees going to twelve of the registered student organizations that received monies through this process.

Both petitioners and respondents regarded the provision of these funds as creating a forum for student speech. *See, e.g.*, Appellees' Br. (No. 97-1001) at 26 ("[t]he students do not dispute that the University has created a public forum of funding for student groups."). As noted earlier, the respondents specifically stipulated that the funding of this forum is "viewpoint-neutral" (Stip. ¶ 12, Pet.-Ap. 106a).

The parties stipulated that the General Student Services Fund (GSSF) "provides a source of funds for those services which provide direct, ongoing services to significant numbers of UW-Madison students" (Stip. ¶ 13, Pet.-Ap. 106a). They also stipulated that "GSSF funds should also contribute significantly to student health, safety or academic success" (Stip. ¶ 13, Pet.-Ap. 106a). Respondents objected to funding for five of the organizations that received GSSF funding, for a total cost of $1.76 in fees per student per semester (1995-96 school year). Respondents also objected to the $.71 of their activity fee that

funded the Wisconsin Student Public Interest Research Group (WISPIRG), whose funding was authorized by direct student referendum. In all, respondent students objected to the funding of 18 organizations.

B. The District Court's Decision.

The district court described the competing interests as the students' "constitutional right not to be compelled to financially subsidize political or ideological activities balanced against the Board of Regents' authority to promote the university's educational mission by providing opportunities for the free expression of diverse viewpoints on difficult and challenging issues" (Pet.-Ap. 86a). Without much explanation, the district court found that the educational benefits of some of the student organizations challenged by respondents were only limited and incidental to their primary political or ideological purposes. The district court rejected petitioners' argument that a viewpoint-neutral forum was being funded and went on to apply a confusing mixed analysis with elements of a "strict scrutiny" test and a "germaneness" test (from *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) (concerning compulsory union dues in a closed shop) and *Keller v. State Bar of California*, 496 U.S. 1 (1990) (concerning compulsory bar dues)). The district court concluded that the funding of student organizations whose primary purpose is to advance political or ideological causes is "not germane to the university's function and accordingly not narrowly tailored to avoid the unnecessary infringement of plaintiffs' First Amendment rights." (Pet.-Ap. 99a).

C. The Seventh Circuit's Decision.

Consistent with the parties' agreement that the challenged funding mechanism resulted in the creation of a non-spatial forum, the Seventh Circuit recognized that in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), "[t]he Supreme Court held that the student activity fees created a forum of money and that once established the forum had to be made available on a viewpoint-neutral basis." 151 F.3d at 722 (Pet.-Ap. 22a). It was this aspect of the funding mechanism which the Court of Appeals perceived as offending First Amendment principles: "If the university cannot discriminate in the disbursement of funds, it is

imperative that students not be compelled to fund organizations which engage in political and ideological activities – that is the only way to protect the individual's rights." *Id.* at 730 n.11 (Pet.-Ap. 40a).

In reaching this conclusion, the Court of Appeals looked to *Abood* and *Keller*'s standards of germane organizational speech as the general principles guiding its decision. The actual determination that the challenged fee mechanism violated the First Amendment proceeded from the Court of Appeal's attempt to apply the three-prong test of whether union expenditures violated the objecting employees' First Amendment rights that a majority of Justices had endorsed in *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507 (1991) (but whose application had been agreed to only by a plurality). Under *Lehnert*'s three-prong test the expenditure must be (1) "germane to collective-bargaining"; (2) "justified by the government's vital policy interest in labor peace and avoiding 'free riders'"; and (3) "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 151 F.3d at 724, citing, *Lehnert*, 500 U.S. at 519 (Pet.-Ap. 26a). Neither side had argued *Lehnert* as providing the governing standard. The district court had not relied on or even cited the *Lehnert* standard. To petitioners' knowledge, no court has employed the *Lehnert* test to determine the validity of viewpoint-neutral funding of student speech in a university setting.

In assessing the first prong of *Lehnert*, the Court of Appeals focused principally on the educational value of the content of student group expression, failing to recognize that the much greater educational benefit is likely to lie in the experience of participating in a student organization and expressing one's views outside the classroom and, for the students who serve as the potential audience for such speech, in learning to sort through, and at times turn off, the multiplicity of ideas that find expression on a university campus.

In applying the second prong of *Lehnert*, the Court of Appeals ignored petitioners' main justification for mandatory student funding of student group expression, *i.e.*, that the provision of funding to student groups on a viewpoint-neutral basis created a non-spatial forum for speech. Furthermore, the Court of Appeals

failed to distinguish between organizations receiving funding as part of the forum and organizations that were funded because they provide services to significant numbers of UW-Madison students. The Court of Appeals decision treated all the challenged organizations as though they received their funding through the same process for the same purpose.

In discussing *Lehnert*'s third prong, the Court of Appeals indicated that it was precisely because all student groups would be eligible for funding without regard to their points of view, that objecting students needed to be allowed to withhold funding. 151 F.3d at 730 n.11 (Pet.-Ap. 40a). The Court of Appeals failed to distinguish between being forced to support the speech of a particular group and being compelled to provide funding to create a forum for speech by any group.

Upon petition for rehearing with suggestion for rehearing en banc, a majority of the judges in active service voted to deny rehearing, but four voted to grant rehearing en banc. Judge Ilana Diamond Rovner dissented from the denial of rehearing en banc and filed an opinion which was joined by Judges Diane P. Wood and Terence T. Evans. Judge Rovner wrote that "the free expression of a wide range of ideas is central to the educational mission of a university," further noting that respondents conceded that the funding arrangement created a forum. 157 F.3d at 1125 (Pet.-Ap. 3a). Judge Wood also authored a dissent, joined by Judges Rovner and Evans, writing that the First Amendment and Supreme Court precedent did not call for the outcome the panel had reached. Judge Wood explained that forum-creation analysis rather than compelled speech analysis was appropriate, and recognized the validity of compelled subsidy of a neutral forum for speech. Both dissents discussed the broad ramifications for public universities of the Court of Appeals' decision.

REASONS FOR GRANTING THE WRIT

The Court of Appeals itself recognized that the circuits are split on how the analysis of *Abood* and *Keller* apply to the constitutional uses of mandatory student activity fees. 151 F.3d at 723 (Pet.-Ap. 23a). Judges Rovner and Diane P. Wood, in their dissents from the denial of rehearing en banc, state that the panel's

decision conflicts with the holding of the Second Circuit in *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992) and *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994). 157 F.3d at 1125 and 1127 (Pet.-Ap. 2a and 7a).

This case is also of great national importance. The case sets before this Court the question of whether the First Amendment is violated when a public university uses a portion of student activity fees paid by students who have chosen to matriculate to fund a forum for the expression of a wide-range of ideas on diverse topics. The issue is framed by the parties' stipulation that the funds distributed as the forum are distributed on a viewpoint-neutral basis. This Court expressly reserved the constitutional question of "whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe" in *Rosenberger*, 515 U.S. at 840. *See also id.* at 851 (O'Connor, J., concurring). The Court of Appeal's decision undermines the traditional role of universities as centers of free speech and the tradition of student-run activities. *See* 157 F.3d at 1127 (Wood, D.P., J., dissenting) (Pet.-Ap. 6a). The resolution of the First Amendment forum question this case presents is important to public universities across the nation as they struggle with determining how to fund student activities, while respecting the rights of students who object to funding views with which they disagree.

The second question, of whether the First Amendment is violated when a public university uses a portion of student fees to fund organizations that provide student services, is framed by the parties' stipulation that these organizations provide services to a significant number of the students on the campus. This case presents an important question that has not been treated separately by the courts. Courts have conflated the two issues, treating student service organizations and/or the services themselves as though their principal purpose was political or ideological advocacy, and subjecting them to the same First Amendment analysis.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS FROM OTHER CIRCUITS.

The Court of Appeals noted that "every other circuit to have considered the constitutional uses of mandatory student activity fees has applied the *Abood [v. Detroit Bd. of Education*, 431 U.S. 209 and *Keller [v. State Bar of California*, 496 U.S. 1] analysis," but recognized that "the circuits are split on how exactly the analysis applies," and cited *Galda v. Rutgers*, 772 F.2d 1060, 1063-64 (3d Cir. 1985); *Carroll v. Blinken*, 957 F.2d at 997; *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992), *cert. den.*, 506 U.S. 1087 (1993); and *Kania v. Fordham*, 702 F.2d 475, 479-80 (4th Cir. 1983). 151 F.3d at 723 (Pet.-Ap. 23a). The dissents from the denial of rehearing en banc noted that the Seventh Circuit's decision conflicts with the holding of at least one other circuit, citing *Carroll v. Blinken*, 957 F.2d 991, and *Carroll v. Blinken*, 42 F.3d 122. 157 F.3d at 1125 (Rovner, J., dissenting) (Pet.-Ap. 2a); see also 157 F.3d at 1127 (Wood, D.P., J. dissenting) (Pet.-Ap. 7a).

In *Carroll v. Blinken*, 957 F.2d at 1001, the Second Circuit concluded that the interests of "the promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate -- together are substantial enough to justify the infringement of appellants' First Amendment right against compelled speech that occurs when SUNY Albany transfers a portion of the activity fee to NYPIRG [New York Public Interest Research Group]." On the appeal after remand, the Second Circuit held student activity fees could be used for "(1) activities that foster a 'marketplace of ideas' on the SUNY Albany campus; (2) activities that provide SUNY Albany students with hands-on educational experiences; and (3) extra-curricular activities for SUNY Albany students, both on and off the Albany campus that fulfill SUNY educational objectives." *Carroll v. Blinken*, 42 F.3d at 128.

Similarly, in *Hays*, 969 F.2d at 123, the Fifth Circuit found that a university's educational goals justified the subsidy of a University-sponsored newspaper:

> [T]he University's educational goals [are] sufficiently weighty to justify the University's subsidy of a student-run newspaper. Such a newspaper allows students to have first-hand journalism experience difficult to obtain otherwise. It also creates a forum for public discussion of University-related issues that can "stimulate uninhibited and vigorous discussion on matters of campus and public concern."

Hays, 969 F.2d at 123 (citation omitted).

In *Kania v. Fordham*, 702 F.2d at 481, the Fourth Circuit concluded that a university's partial funding of a student newspaper through mandatory student fees was constitutional. The Fourth Circuit noted that the newspaper did not show any systematic discrimination against opposing viewpoints and concluded that the funding of the newspaper served "the state's legitimate interest in creating the richest possible educational environment at the University and, in its role as a forum for the expression of differing viewpoints, is a vital instrument of the University's 'marketplace of ideas.'" *Id.* at 477 (citation omitted).

In contrast, the Third Circuit in *Galda v. Rutgers*, 772 F.2d 1060, applied the *Abood* and *Keller* germaneness analysis and concluded that the New Jersey Public Interest Research Group's educational benefits were incidental to the organization's primarily political and ideological purpose. However, even that court recognized the importance of, and distinction when, a forum is created with the funds:

> As *Galda I* emphasized, there is a distinction between PIRG and student organizations that are funded through the student activity fee. We noted that the student activity fee is used to subsidize a variety of student groups, and therefore

> that assessment can be "perceived broadly as providing a 'forum' for a diverse range of opinion."

Galda, 772 F.2d at 1064.

State supreme courts have also split on this important First Amendment issue. *Contrast Smith v. Regents of University of Cal.*, 4 Cal.4th 843, 16 Cal.Rptr.2d 181, 844 P.2d 500, *cert. den.*, 510 U.S. 863 (1993) (public fora cases offer little assistance, no student group claims to be a public forum; when the educational benefits a student group offers become incidental to the group's primary objective of advancing its own political and ideological interests it cannot be funded with compulsory fees); *with Lace v. University of Vermont*, 131 Vt. 170, 303 A.2d 475 (1973) (mandatory fee funding constituted a "monetary platform" for introducing spectrum of ideas into campus, students had not shown that university prevented them from presenting their own viewpoints); *Good v. Associated Students of Univ. of Washington*, 86 Wash.2d 94, 542 P.2d 762 (1975) (mandatory fee funding held constitutional when balanced against university's purpose of posing a broad spectrum of ideas, provided expenditures were within statutory authorization); and *Larson v. Board of Regents of University of Neb.*, 189 Neb. 688, 204 N.W.2d 568 (1973) (mandatory fees to fund student newspaper, student government and speaker's program held to be part of educational process; so long as many viewpoints were expressed, there was no constitutional violation).

This significant constitutional question that has split the circuits and that was expressly reserved in *Rosenberger*, 515 U.S. at 840, is ready for this Court's resolution. The secondary question, concerning the application of First Amendment principles to the funding of student services provided by organizations funded through student activity fees merits resolution at the same time, since courts have considered the issues together and funding for both is the common practice.

II. THIS CASE PRESENTS IMPORTANT CONSTITUTIONAL QUESTIONS.

The constitutional issues being presented to this Court are whether a small portion of the student activity fee paid by students

at a public university can be used to fund (1) what respondents and the Court of Appeals have recognized is a forum[1] that distributes money to student organizations on a basis that is "viewpoint neutral," as stipulated to by all parties; and (2) organizations that provide services to significant numbers of students, even if the organizations providing services, or the services themselves, may have some advocacy component. The constitutional question concerning funding of a forum of money is one which the Supreme Court explicitly reserved in *Rosenberger*, 515 U.S. at 840:

> The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. See *Keller* (citation omitted); *Abood* (citation omitted).

See also id. at 851 (O'Connor, J., concurring).

In dissenting from the denial of rehearing en banc, Judge Rovner noted the importance of the question of funding of a forum raised in this petition: "This important First Amendment case merits the consideration of the full court. . . . . Its effect is to impede the ability of public universities to fund student groups that represent a wide range of viewpoints. The resulting impact on the expression of ideas on campus would undermine the educational mission of those universities, and is not required by the First Amendment." 157 F. 3d at 1125 (Rovner, J., dissenting) (Pet.-Ap. 2a). In her dissent, Judge Wood wrote: "It would be difficult to overstate the ramifications of the panel's conclusion that the First Amendment prohibits student associations at public universities from distributing a common fund to a particular student group, if one or more students at the university find the recipient's message offensive. I fear this will spell the end, as a practical matter, to the long tradition of student-managed activities on these campuses." *Id.* at 1127 (Wood, D.P., J., dissenting) (Pet.-Ap. 6a).

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[1] *See, e.g.*, Appellees' Br. (No. 97-1001) at 26 ("[t]he students do not dispute that the University has created a public forum of funding for student groups.").

As noted above, both petitioners and respondents had regarded the provision of funding to student groups on a viewpoint-neutral basis as creating a non-spatial forum for speech in their arguments to the Court of Appeals. The Court of Appeals did not disagree, but expressly commented that in *Rosenberger*, "[t]he Supreme Court held that the student activity fees created a forum of money and that once established the forum had to be made available on a viewpoint-neutral basis." 151 F.3d at 722 (Pet.-Ap. 22a). However, the Court of Appeals still failed to apprehend the critical difference between being forced to support the speech of a particular group and being compelled to provide funding to create a forum for speech by any group, a fundamental distinction that is plainly at the heart of much First Amendment jurisprudence. The whole point of a forum and its special First Amendment status is that anyone and everyone can use it no matter how offensive their speech may be to some. *Cf., Nat. Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam). It then is difficult to see how the First Amendment is offended by requiring politically liberal homosexual students and conservative, Christian students alike to bear the costs of creating a forum for the expression of each other's and all other viewpoints at the University of Wisconsin.

Under the forum framework, the state's interest in the challenged funding is the same as it would be if the university used part of the student fees to build a new auditorium where any speaker would be permitted to speak. Both authors of the dissents from the denial of rehearing noted that the Court of Appeals had erred in using a compelled speech analysis rather than a forum creation analysis. 157 F.3d at 1128 (Wood, D.P., J. dissenting) (Pet.-Ap. 10a), 157 F.3d at 1126 (Rovner, J. dissenting) (Pet.-Ap. 4a). The use of compelled speech analysis ignored that both parties had argued that a forum was created with the student activity fees, that the funded student organizations did not speak for the university or even for the student body (151 F.3d at 732, Pet.-Ap. 44a), and that in fact the funded organizations presented conflicting views on issues. Judge Wood noted in her dissent from the denial of rehearing en banc that the Court of Appeal's decision appears to create a serious conflict with the premise that student fees can fund a monetary forum which underlies this Court's decision in *Rosenberger*. 157 F.3d at 1127 (Wood, D.P., J., dissenting) (Pet.-Ap. 7a).

The Court of Appeals purported to apply a three part test from *Lehnert*, 500 U.S. 507 (that five Justices subscribed to generally, but not as applied), even though *Lehnert* was a plurality decision addressing the expenditure of compulsory union dues in furtherance of a labor union's own expressive activities, even though the district court had not relied on or applied *Lehnert*, even though the parties had not discussed applying *Lehnert*, and even though petitioners could not find any other reported decision applying *Lehnert's* three-prong test to the use of mandatory student fees to fund expressive activities on a university campus through a viewpoint-neutral distribution system. *Lehnert's* test was expressly framed in terms of collective bargaining activities and the governmental justification for authorizing agency or union shops. *See Lehnert*, 500 U.S. at 519. There are many differences between the types of discourse that occur at a large, public university and the type of advocacy a labor union is likely to engage in. These differences render problematic any attempt to apply *Lehnert* to a university setting. Judge Wood stated in her dissent: "important and unsettled questions of law exist, insofar as the majority is relying on the views of the plurality of four members of the Supreme Court in *Lehnert* [citation omitted]." 157 F.3d. at 1127 (Wood, D.P., J., dissenting) (Pet.-Ap. 7a). And as Judge Rovner stated:

> I submit that the potential interference with the speech interests of the students in this case are overstated. This section of the opinion relies entirely on a part of *Lehnert* [citation omitted] which received the support of only four justices, and thus is not controlling. Moreover, the panel fails to recognize that the "burden on objecting student's speech" is lessened by the availability of the same funds to present opposing speech. In that way, this case is again fundamentally different from *Abood* and *Keller*. In *Abood*, the union was the sole determinant of the speech. Similarly, in *Keller*, the bar association that received funds controlled the speech. In the present case, however, the activity fees are available to myriad student groups. . . . [T]he dues support multiple viewpoints. Indeed, the objectors could

> presumably form their own student group and receive funds for the expression of a contrary viewpoint, and some belong to a group that already does so. Where the same funds are available for them to express their disagreement, the burden on their speech is minimal.

157 F.3d at 1126-27 (Rovner, J., dissenting) (Pet.-Ap. 6a).

This Court's precedent has long recognized the unique role of universities in providing a wide range of expression, even if that speech is political and ideological. *See* 157 F.3d at 1126 (Rovner, J., dissenting) (Pet.-Ap. 5a) citing *Healy v. James*, 408 U.S. 169, 180-81 (1972); *Keyishian v. Board of Regents of U. of St. of N.Y.*, 385 U.S. 589, 603 (1967); and *Widmar v. Vincent*, 454 U.S. 263, 278-80 and n.2 (1981). The very mission of the University of Wisconsin system, established by statute, shows the broad role a public university plays in the community. This stands in stark contrast to the narrow roles of unions and bar associations at issue in *Abood*, *Keller* and *Lehnert*:

> The mission of the system is to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities, scientific, professional and technological expertise and a sense of purpose. Inherent in this broad mission are methods of instruction, research, extended training and public service designed to educate people and improve the human condition. Basic to every purpose of the system is the search for truth.

Wis. Stat. § 36.01(2).

The Court of Appeals' decision also painted with too broad a brush when it included all organizations that provide services to students within its decision on political and ideological advocacy, without considering the stipulation that the organizations provide

services to significant numbers of students and without considering the importance of these services, separate from any advocacy.

A decision by this Court on whether a public university can use a portion of the student activity fee paid by students who choose to matriculate to fund a viewpoint-neutral forum and to fund the provision of services to a significant portion of the student body, would resolve the differences of opinion between different circuit courts and within the Seventh Circuit itself, as well as between the highest courts of several states. This Court would give guidance to public universities across the nation concerning how to collect and distribute student activity fees. No further proceedings in the lower courts are needed to clarify the issues presented, and the parties entered a stipulation concerning material facts. These important questions of constitutional law are ready for resolution by this Court.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

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January 1999

No. ____

In The

Supreme Court of the United States

October Term, 1998

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

v.

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX FOR PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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In the
United States Court of Appeals
for the Seventh Circuit

NOS. 97-3510 & 97-3548

SCOTT H. SOUTHWORTH, AMY SCHOEPKE and KEITH BANNACH, et al.,

Plaintiffs-Appellees, Cross-Appellants,

v.

MICHAEL W. GREBE, SHELDON B. LUBAR, JONATHAN B. BARRY, et al.,

Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 96 C 292—**John C Shabaz**, *Chief Judge.*

On Petition for Rehearing En Banc

SUBMITTED AUGUST 31, 1998—DECIDED
OCTOBER 27, 1998

Before POSNER, *Chief Judge,* and CUMMINGS, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, ROVNER, DIANE P. WOOD and EVANS, *Circuit Judges.*

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by defendants-appellants and the answer of the plaintiffs-appellees, all of

the judges on the original panel voted to deny rehearing and a majority of the judges in active service voted to deny rehearing en banc. Judges Walter J. Cummings, Ilana Diamond Rovner, Diane P. Wood and Terence T. Evans voted to grant rehearing en banc. Judge Ilana Diamond Rovner dissented from the denial of rehearing en banc and filed an opinion which was joined by Judge Diane P. Wood and Judge Terence T. Evans. Judge Diane P. Wood dissented from the denial of rehearing en banc and filed an opinion which was joined by Judge Ilana Diamond Rovner and Judge Terence T. Evans.

The petition for rehearing is denied.

ROVNER, *Circuit Judge,* with whom DIANE P. WOOD and EVANS, *Circuit Judges*, join, dissenting from the denial of rehearing *en banc*. This important First Amendment case merits the consideration of the full court. This panel's opinion conflicts with the holding of at least one other circuit, *see Carroll v. Blinken,* 957 F.2d 991 (2d Cir. 1992) and *Carroll v. Blinken,* 42 F.3d 122 (2d Cir. 1994), and, in my view, misapprehends Supreme Court precedent. Its effect is to impede the ability of public universities to fund student groups that represent a wide range of viewpoints. The resulting impact on the expression of ideas on campus would undermine the educational mission of those universities, and is not required by the First Amendment.

The panel opinion extends the prohibition against compelled speech to a new level, beyond what has been recognized by the Supreme Court. As the panel recognizes, the controlling Supreme Court cases are *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Keller v. State Bar of California,* 496 U.S. 1 (1990). In *Abood* and *Keller,* however, the recipients of the funds were themselves engaging in the challenged speech, either directly or indirectly. For instance, in *Abood,* the union used dues to fund ideological activities and support political candidates,

and in *Keller,* the state bar used dues for lobbying activities. In contrast to those cases, however, the recipient of the funds in this case is not itself engaging in the challenged speech, nor is that speech even attributable to it. The complaining students are paying fees not to the challenged groups, but to the student government which then uses the money to fund its own operations and over 100 student groups, regardless of viewpoint. This distinction is significant, because the gravamen of the students' complaint is that they are being compelled to speak or to fund speech with which they disagree. The only direct "speech" of the student government, if any, is the promotion of the student government and a forum for student activities and views. The speech of the offending groups can hardly be attributed to the student government, which funds groups of radically different views (including the Federalist Society, of which some plaintiffs were members, and the International Socialist Organization). Indeed, the student government constitutionally must determine funding in a content-neutral manner. *See Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819 (1995).

This is no semantic difference. Numerous courts have recognized that the free expression of a wide range of ideas is central to the educational mission of a university, teaching students to think for themselves and to separate the "wheat from the chaff." The students concede that the funding arrangement is designed to create a public forum for free expression, a concept not objected to by plaintiffs. Inherent in a content-neutral forum, however, is the notion that the creators of the forum do not espouse the views of all speakers. Because the "speech" of the individual groups cannot be attributed to the student government, it necessarily cannot be attributed to the students paying the fees to the student government. Consider the payment of tuition which might support research or class topics with which a student might disagree. It is difficult to see how a student could successfully challenge funding to the socialist student group

because it advocates socialism, but could not challenge the use of tuition to fund the salary of a professor who publishes articles touting the merits of socialism. Just as the university is not endorsing the views of its professors, so too the student government is not espousing any particular political or ideological speech. Rather, it is supporting a forum for a wide range of expression. Therefore, there is no issue of "compelled speech" here because the funds are not used by the student government to engage in that speech.

This does not mean that the constitutionality of the funding scheme should depend upon whether the funding is direct or indirect, or that one can "launder" the funding by passing it through a neutral conduit. As *Abood* and *Keller* make clear, even indirect funding can raise constitutional problems. That is not, however, what is happening in this case. In *Abood* and *Keller,* the funds were used by the union and bar association to engage in political and ideological speech both directly and indirectly through private groups. The crucial point, however, is that the private groups were funded *because* of their political and ideological positions, and *for the purpose of furthering* those positions. Therefore, the speech presented by those groups was attributable to the union and the bar association. They were engaged in political and ideological speech regardless of whether it emerged from their own groups or paid spokespersons for their views. In stark contrast, the student government has not aligned itself with any political or ideological viewpoint. It does not fund the groups because of their political or ideological speech, and no one even suggests that the speech engaged in by those groups can be attributed to the student government itself. If the student government is not itself "speaking," how can funds given to it constitute compelled speech? The chain of custody of the funds cannot itself be enough to raise a constitutional issue. Otherwise, the student government could not even order supplies from a company that contributes to political candidates, because the student government money used to purchase those supplies would be

used to "fund" political speech. At a minimum, we must look to whether the immediate recipient of the funds (here, the student government) is itself engaged in any objectionable speech. If it is not, the inquiry should end.

Even if we assumed that speech by the secondary recipients of the funds could be attributed to the students, and thus be viewed as compelled speech, it does not follow that there is a constitutional violation. The panel applies a test developed for a different context and not suited to this case. Moreover, in contrast to the Supreme Court and Circuit cases concerning compelled speech, the panel fails to address each challenged expenditure individually, and analyze the proper balancing for each one. Instead, the panel declares that political and ideological speech as a whole is not germane to the educational mission. That holding flies in the face of numerous Supreme Court pronouncements regarding the importance of robust debate and free expression in a university setting. *See e.g. Healy v. James*, 408 U.S. 169, 180-81 (1972); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Widmar v. Vincent*, 454 U.S. 263, 278-80 & n.2 (1981). Moreover, the panel erroneously focuses on the motives of the individual groups receiving the funding, stating that the International Socialist Organization, for example, is only incidentally concerned with education and is primarily concerned with promotion of its ideological beliefs. That focus reverses the appropriate analysis. Our focus should be on the funding by the student government, and whether the expression of ideology by the student group promotes the educational mission, regardless of whether that was the intent of the group. Moreover, the reliance on *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), is misplaced here, because the fee in that case was targeted specifically for the objectionable group, not for a forum of all groups, and was granted for the purpose of funding the challenged group's objectives. Because there was a direct connection between the student government and the speech, an analysis of the

educational objectives of that particular group was considered appropriate.

Finally, I submit that the potential interference with the speech interests of the students in this case are overstated. This section of the opinion relies entirely on a part of *Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507 (1991), which received the support of only four justices, and thus is not controlling. Moreover, the panel fails to recognize that the "burden on objecting student's speech" is lessened by the availability of the same funds to present opposing speech. In that way, this case is again fundamentally different from *Abood* and *Keller*. In *Abood*, the union was the sole determinant of the speech. Similarly, in *Keller*, the bar association that received funds controlled the speech. In the present case, however, the activity fees are available to myriad student groups. The recipients of the fees do not have a monopoly on the fees, and therefore the dues support multiple viewpoints. Indeed, the objectors could presumably form their own student group and receive funds for the expression of a contrary viewpoint, and some belong to a group that already does so. Where the same funds are available for them to express their disagreement, the burden on their speech is minimal. For these reasons, I respectfully dissent from the denial of rehearing *en banc*.

DIANE P. WOOD, Circuit Judge, with whom ROVNER and EVANS join, *Circuit Judges*, dissenting from denial of rehearing *en banc*. It would be difficult to overstate the ramifications of the panel's conclusion that the First Amendment prohibits student associations at public universities from distributing a common fund to a particular student group, if one or more students at the university find the recipient's message offensive. I fear this will spell the end, as a practical matter, to the long tradition of student-managed activities on these campuses. If the First Amendment indeed compelled such a result, then we would

have no choice but to enforce it. But in my view, neither the text of the First Amendment nor the relevant Supreme Court precedents call for any such outcome. The unfortunate consequences of an erroneous legal conclusion here are reason enough for the *en banc* court to give this case its full consideration. But there are other reasons as well that underscore the appropriateness of *en banc* review: (1) there is a conflict in the circuits, see *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992) and *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994); (2) important and unsettled questions of law exist, insofar as the majority is relying on the views of the plurality of four members of the Supreme Court in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); and (3) ironically, the panel's decision appears to create a serious conflict with the premise underlying the Supreme Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). For the reasons that follow, I therefore respectfully dissent from the *en banc* court's decision not to rehear this case.

Among the required payments that students registered at the University of Wisconsin must tender, in addition to their tuition payment, is a student activity fee. The University turns a portion of the monies collected over to the Associated Students of Madison (the ASM, or student government), which in turn creates its own budget and allocates surplus funds to various student groups, University departments, community-based service organizations, and registered student organizations. Some of the recipients engage in activities with a political or ideological dimension. In the panel's view, the University's decision to require students to support the ASM and its allocation decisions is tantamount to requiring every individual student to subsidize the speech of every group funded by the ASM. This logical step allows the panel to equate the funding of the ASM to the compelled subsidization of speech addressed in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Lehnert*, *supra*. Based on

this equation, the panel concludes that the mandatory student activity fee violates the First Amendment rights of any students who disagree with the message of any of the funded groups. Finally, the court constructs a remedy that would allow dissenters to opt out of that portion of the fee ultimately earmarked for the objectionable group.

I take issue with the panel's fundamental premise—that the fee is a compelled subsidy of speech itself, rather than a compelled subsidy of a *neutral forum* for speech. In my view, there is a dispositive difference for First Amendment purposes between requiring someone to fund a forum, and requiring someone to support the speech of any or all speakers who come to use the forum. The Supreme Court's decision in *Rosenberger* provides strong support for the characterization of the student activity fee as a forum for speech, which can then be used "to encourage a diversity of views from private speakers." 515 U.S. 819, 830, 834 (1995). Access to that forum, *Rosenberger* makes clear, must be handled on a nondiscriminatory basis: atheist students cannot deny access to the Christian fundamentalists; abortion rights advocates cannot deny access to an organization dedicated to pro-life principles; and Republicans cannot deny access to Democrats.

The panel takes the position that there is no meaningful distinction between a forum for speech and the speakers who use that forum. Again, I respectfully disagree. Different principles control the analysis of compelled funding of a neutral forum than compelled funding of a particular group or speaker. See *Rosenberger*, 515 U.S. at 834. It is commonplace to require the funding of a neutral forum: the taxpayers of the United States support the Mall in Washington, which is used by countless speakers with a virtually infinite range of viewpoints. Even though the government is not entitled to require a citizen to fund the Catholic Church, it is entitled to permit the Pope to conduct a mass on the Mall. See *O'Hair v. Andrus*, 613 F.2d 931, 934

(D.C. Cir. 1979). At some level of generality, this means that non-Catholic citizens have been forced to "subsidize" the religious message that the Pope delivers, but the link is too remote to offend the First Amendment. Indeed, the First Amendment pushes in the other direction, for if the government had to censor the speech of users of the Mall to ensure that it was not offensive to anyone in the country, all it could do would be to close the forum.

Closer to the facts of this case, the University of Wisconsin obviously compels its students to make other payments as well, notably tuition. Just as is the case with the activity fee, students at the University of Wisconsin cannot graduate or receive their grades if they fail to pay their tuition. But what happens to the funds generated by tuition? The University uses them for its operations, and the lion's share of the budget in most universities goes to faculty salaries and research support. Some students undoubtedly find the viewpoints of some faculty members, expressed either in the classroom or in scholarship, to be offensive. Suppose, for example, there is a doctor in the medical school researching more effective ways to use fetal tissue for organ transplants. It is easy enough to imagine a student finding this antithetical to her religious or moral views. Or suppose the University disburses tuition funds to a sociologist who is exploring the hypothesis that children suffer long-term harm if their mothers work while the child is still under the age of 10. A different student may find that equally offensive. (One might say that a student knows *ex ante* that a university has tenured a faculty member with views offensive to that student, and she implicitly agrees to have part of her tuition allocated to that professor when she decides to attend the university. But by the same token the student knows that there is a student association, and she knows something about the demographics of the student body. More than that, unlike a tenured faculty, the membership of a student association changes quickly, and the student has a voice in its composition. More importantly, however, *ex ante* knowledge

cannot cure what would otherwise be a First Amendment violation. No one would say that a worker who objected to a union's activities under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), had lesser rights just because the worker knew when she joined the company what the union was doing. The analogy between the offensive professor and the offensive student group is therefore a close one.) The First Amendment surely does not mandate that researchers be funded on a consenting-student-by-consenting-student basis on the theory that tuition is a compelled subsidy of these researchers' speech. Just as the University as an institution is not espousing the viewpoints of any individual faculty members, the ASM is also not espousing the viewpoints of any of the organizations it funds. Here, both the ASM and the University are doing nothing more than creating the forum for the expression of other people's views. It is the same as if they simply built a large auditorium and held it open for everyone.

The fact that a forum-creation analysis rather than a compelled speech analysis is appropriate here means that *Abood, supra*, and *Keller, supra*, provide only limited help in resolving this case. Important distinctions exist between the relationship between dissenters and speakers there, and the relationship here. Neither the union nor the bar association in those cases created a viewpoint-neutral forum, as the ASM does (and must in the wake of *Rosenberger).* In *Abood* and *Keller,* the organizations at issue were pursuing their own political agendas, and they funded recipient organizations' speech on the basis of viewpoint. The *Abood* and *Keller* plaintiffs' objection to being forced to contribute despite their opposing beliefs was, in essence, an objection to compelled political speech. Here, in contrast, the objecting students are required to fund the ASM, which in turn funds a vast array of recipient organizations regardless of viewpoint-indeed, often with conflicting viewpoints. There is a crucial difference between a requirement to pay money to an organization that explicitly aims to subsidize one viewpoint to the exclusion of

other viewpoints, as in *Abood* and *Keller,* and a requirement to pay a fee to a group that creates a viewpoint-neutral forum, as is true of the student activity fee here. The former is subject to additional First Amendment constraints and must therefore allow dissenters to opt out of the fund; the latter satisfies the First Amendment's concerns with the plurality of views inherent in its viewpoint-neutrality.

Nothing in *Lehnert, supra, is* to the contrary. The issue presented in that case concerned "the constitutional limitations, if any, upon the payment, required as a condition of employment, of dues by a nonmember to a union in the public sector." 500 U.S. at 511. The Court found that *Abood* applied, and it analyzed various particular expenditures that the nonmembers either could or could not be required to support. But these were all direct payments to the organization engaging in the "speech"; nothing like a viewpoint-neutral forum was involved. I do not find *Lehnert* the compelling precedent for this case that the panel did, even apart from the fact that the panel concedes it is relying on one of the parts of the opinion that commanded only a plurality of the Court.

The panel may think it a matter of little moment if the University cannot collect, even temporarily, the few dollars from dissenting students that had been destined for the organizations to which they object. I am not so sanguine. Indeed, I fear that the rule announced in this case, in combination with *Rosenberger,* will logically result in excluding everyone. Just as these plaintiffs have a "hit list" of organizations to which they object, other students will have their own lists. At a large and diverse university like the University of Wisconsin at Madison, some students will almost certainly object just as strongly to a Christian Coalition, or to the Federalist Society, or to the Pro-Life Action League as these plaintiffs do to WISPIRG, the Campus Women's Center, the Lesbian, Gay, Bisexual Campus Center, and the rest. *Some* students will object on

ideological grounds to virtually every organization funded by the ASM. The transaction costs attendant to soliciting and processing the individual preferences of each of the 40,196 students at this university, to reduce the semester fee from $165.75 to some lower number, would be prohibitive. In the end, grafting dissenters' rights onto a neutral forum for the expression of a full panoply of viewpoints will most likely eliminate the forum altogether, which is a perverse way indeed to safeguard the kind of free and open political and intellectual debate that lies at the heart of the First Amendment, and that is especially important in a university setting, see, *e.g., Carroll v. Blinken,* 957 F.2d 991, 999-1001 (2d Cir. 1992). This surely turns *Rosenberger* on its head, transforming it into the instrument that undoes the very "tradition of thought and experiment" the Court so vigorously sought to protect. 515 U.S. at 835. Further, eliminating the forum would also deprive the students of the opportunity to serve their community and develop the kind of skills required to run a student association, a student union, or a like group.

In sum, I believe the panel erroneously analyzed the mandatory student activity fee at the University of Wisconsin as the compelled subsidy of specific instances of speech rather than as the compelled creation of a neutral forum for speech. This error has serious and harmful consequences, at odds with the First Amendment rather than compelled by it, which will be felt at all public universities in this circuit. It will needlessly reduce the quality of education and experience these institutions can offer matriculating students. I therefore respectfully dissent from the court's decision not to rehear the case *en banc.*

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

In the
United States Court of Appeals
for the Seventh Circuit

NOS. 97-3510 & 97-3548

SCOTT H. SOUTHWORTH, AMY SCHOEPKE and KEITH BANNACH, et al.,

Plaintiffs-Appellees, Cross-Appellants,

v.

MICHAEL W. GREBE, SHELDON B. LUBAR, JONATHAN B. BARRY, et al.,

Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 96 C 292—**John C Shabaz**, *Chief Judge.*

On Petition for Rehearing En Banc

SUBMITTED FEBRUARY 26, 1998*—DECIDED AUGUST 10, 1998

Before BAUER, HARLINGTON WOOD, JR. and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* Students attending the University of Wisconsin-Madison must pay a student activity fee. A portion of this mandatory fee is distributed to private organizations which engage in political and ideological activities. Plaintiffs, students at the University of Wisconsin-Madison, sued the Regents of the University claiming that forcing objecting students to fund such organizations violates their First Amendment rights, as well as other federal and state statutes. After various procedural motions and argument, the district court granted plaintiffs summary judgment on their freedom of speech and association claims, dismissed the remaining claims, and entered an injunction which both barred such funding and established a detailed opt-out mechanism. We affirm the district court's determination that forcing objecting students to fund private organizations which engage in political and ideological activities violates the First Amendment, but reverse and vacate portions of the declaratory judgment and injunction.

* This is a successive appeal to No. 97-1001, which was argued on June 14, 1997, and which we dismissed for lack of jurisdiction. *Southworth v. Grebe*, 124 F.3d 205 (7th Cir. 1997) (unpublished order).

I. BACKGROUND.

A. Procedural and Factual Background

Plaintiffs Scott Southworth, Amy Schoepke, Keith Bannach, Rebecca Bretz, and Rebecka Vander Werf each attended or still attend the University of Wisconsin-Madison. They sued the members of the Board of Regents of the University of Wisconsin System ("the Regents"), claiming that the Regents' use of objecting students' mandatory student activity fees to fund private organizations that engage in political and ideological advocacy, activities, and speech violates their rights of free speech and association, the Free Exercise clause of the Constitution, the Religious Freedom Restoration Act, ("RFRA")[1], and various state laws. They sought both injunctive and declaratory relief.

[1] The Supreme Court declared the RFRA unconstitutional in *City of Boerne v. P.F. Flores, Archiboshop of San Antonio*, 117 S.Ct. 2157 (1997).

The district court granted plaintiffs summary judgment on their free speech and free association claims, and the Regents appealed. We dismissed the original appeal as impermissibly interlocutory, and remanded to the district court. *Southworth v. Grebe,* 124 F.3d 205 (7th Cir. 1997) (unpublished order). Following various interim procedural refinement—none of which merit discussion here the district court dismissed the remaining claims and granted the plaintiffs injunctive relief. This successive appeal followed. Because extensive briefing and argument on the merits of this case have already occurred, we instructed the parties to limit their additional briefing to the district court's decision on remand. We have reviewed these new briefs and the record, and conclude that additional oral argument on those issues is unnecessary, Fed. R. App. P. 34(a), Cir. R. 34(f). We now proceed to the merits, which include only the plaintiffs' First Amendment challenge to the Regents' mandatory student activity fee policy.

B. **Mandatory Student Fee Policy**

Students enrolled full-time at the University of Wisconsin-Madison must pay a mandatory student activity fee; it's mandatory because students who refuse to pay can not receive their grades or graduate. During the 1995-96 academic year (the academic year during which the plaintiffs filed suit) the Regents assessed a mandatory student fee of $165.75 each semester.

Section 36.09 of the Wisconsin Code gives both the Regents and the students control over the funds generated by the mandatory student fee. The extent of control depends on the classification given the student fees: The Regents classify a portion of the student fees as nonallocable and a portion as allocable. Although the students (through student government representatives) review and make recommendations regarding the use of nonallocable fees, the

Regents control the distribution of these fees. (The nonallocable fees cover expenses such as debt service, fixed operating costs of auxiliary operations, student health services, and the first and second year of the Recreational Sports budget.) On the other hand, the Associated Students of Madison ("ASM") (the official representative of the student body) has complete authority over most of the allocable funding. Because the plaintiffs challenge only the funding from the allocable portion of student fees, we focus on those expenditures.

The distribution network for allocable student fees is rather complicated. We will attempt to draw the money trail to help explain the source of the complaint. As just noted, the ASM has authority over the allocable portion of student fees. Among other things, these fees fund the General Student Service Fund ("GSSF") and the Associated Students of Madison budget. In turn, both the GSSF and the ASM distribute the mandatory student fees to other private organizations, although the distribution process differs. The GSSF is distributed to private organizations by a committee of the ASM called the Student Services Finance Committee ("SSFC").[2] Registered student organizations, University departments, and community-based service organizations qualify for funding from the GSSF. To obtain money from the GSSF, the organization must apply to the SSFC. After reviewing the application, the SSFC determines whether to grant or deny the request for money, and if granted the SSFC also determines the amount of funding the private organization will receive. During the 1995-96 school year, the SSFC distributed about $74,200 in student fees to private organizations.

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[2] Because of the need to abbreviate the various student groups by letters/acronyms, we insert for convenient reference: ASM - Associated Students of Madison; GSSF - General Student Service Fund; SSFC - Student Services Finance Committee.

The ASM budget also funds private organizations, although only "Registered Student Organizations" qualify for funding from the ASM budget. To qualify as a Registered Student Organization, among other things, a group must be a formalized not-for-profit group, composed mainly, but not necessarily exclusively, of students, and controlled and directed by students. A Registered Student Organization may obtain money from the ASM budget in the form of a grant to support its operations, related travel, or to sponsor an event. During the 1995-96 school year, the ASM budget distributed $109,277 in student fees to private organizations.

In addition to obtaining money from the GSSF and the ASM budget, a Registered Student Organization may seek funding through a student referendum. With a student referendum, students vote at large on whether or not to approve an assessment for the student group. The Wisconsin Student Public Interest Research Group ("WISPIRG") obtained $49,500 in student fees during the 1995-96 academic year as the result of a student referendum.

After the ASM and the SSFC (or the students by referendum) have made their funding decisions, these decisions are sent to the Chancellor and the Board of Regents for their review and approval; while the ASM has complete authority over most of the allocable funding, the Regents have final authority to approve or disapprove the allocations of funds by the student government under section 36.09(5) of the Wisconsin Code.

C. Organizations Funded by the Student Fees

The GSSF, the ASM budget, and student referendums can fund many different activities and organizations. However, the plaintiffs object only to the funding of organizations which engage in political and ideological activities with fees collected from students who object to

such funding. (Henceforth we shall refer to them as "objecting students.") Plaintiffs presented evidence of eighteen organizations which both receive student fees and engage in political and ideological activities: WISPIRG; the Lesbian, Gay, Bisexual Campus Center; the Campus Women's Center; the UW Greens; the Madison AIDS Support Network; the International Socialist Organization; the Ten Percent Society; the Progressive Student Network; Amnesty International; United States Student Association; Community Action on Latin America; La Colectiva Cultural de Aztlan; the Militant Student Union of the University of Wisconsin; the Student Labor Action Coalition; Student Solidarity; Students of National Organization for Women; MADPAC; and Madison Treaty Rights Support Group.

Reviewing the evidence in the light most favorable to the Regents, as we must, we conclude that the 18 organizations listed above both receive student fees and engage in political and ideological activities. While the record is replete with examples, we limit ourselves to a sample:

WISPIRG, which received $49,500 in student fees during the 1995-96 school year, distributed $2,500 directly to its parent organization U.S. PIRG for use in lobbying Congress and developing candidate-voter guides. WISPIRG also published a voters' guide, which ranked congressional candidates based on their views on various pieces of federal legislation. During 1995-96, the UW Greens received $6,905 in student fees. The UW Greens, along with the Progressive Student Network (another group funded with student fees), lobbied the Wisconsin state legislature, and encouraged legislators to introduce three bills which would limit mining in the state. The UW Greens also distributed literature for the Green Party USA, a political party, and distributed campaign literature for Ralph Nader during his bid for U.S. President on the Green Party ticket. Along with WISPIRG and other groups, the UW Greens also organized a march on

the state capital to show their opposition to the governor and the governor's budget.

Another recipient of mandatory student fees, the International Socialist Organization, advocated the overthrow of the government: "Revolution Not Reform. Reforms within the capitalist system cannot put an end to oppression and exploitation. Capitalism must be overthrown. The structures of their present government—parliaments, the army, the police and capitalism—cannot be taken over and used by the working class." Along with the UW Greens and other groups, the International Socialist Organization sponsored a rally at the state capitol and at a congressman's office. The International Socialist Organization also joined with about 400 others to demonstrate outside a church located in Madison to oppose the ideological views of a church speaker.

The Campus Women's Center, which received $34,200 in student fees, used its bimonthly newsletter to advocate its political and ideological views. For instance, in the February/March 1996 issue of "The Source," the newsletter published a lengthy article opposing the Informed Consent Bill (Assembly Bill 441), which proposed certain regulations of abortion. This article urged people to contact the Campus Women's Center to learn how they could work against this legislation:

> We must act now to block this bill. You can obtain a copy of the bill at the Legislative Reference Bureau. Familiarize yourself with its contents and get prepared to defend women's rights to reproductive choice when the bill hits the Senate Floor in March. For more information or to find how you can become further involved, contact Jennifer at the Campus Women's Center: 262-8093.

Other examples include the Ten Percent Society which in its funding application stated that it has "also been active in

the political arena as necessary." The Ten Percent Society received funding and used its Internet Home Page to advocate legislation authorizing same-sex marriages, while condemning attempts by the Wisconsin Legislature to ban them. The Progressive Student Network and Amnesty International also received student fees: The Progressive Student Network focused on a variety of issues including "free trade (NAFTA/GATT), welfare reform, . . . right-wing backlash on campus, the GOP's 'contract with America,' etc. . . ." And Amnesty International worked publicly for the abolition of the death penalty.

The defendants do not dispute that these and other organizations engage in political and ideological speech. Instead, the Regents argue that the First Amendment protects the rights of these organizations to engage in such speech. Of course it does. But the students do not ask that we restrict the speech of any student organization; they merely ask that they not be forced to financially subsidize speech with which they disagree. In other words, Amnesty International is free to oppose the death penalty and can continue to advocate its position; the Women's Resource Center can still speak out against informed consent legislation; and the UW Greens, the International Socialist Organization and WISPIRG can lobby all they want. The Regents and amici rely on the First Amendment's guarantee of free speech as support for their position, but the First Amendment does not guarantee that the government will subsidize speech. *See, Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 n.9 (1986) ("[T]here is no right to have speech subsidized by the Government."). In short there is absolutely no question here of restricting the speech of any private organization. *See, e.g., Smith v. Regents of the University of California*, 844 P.2d 500, 503 (Cal. 1993) ("In fact, the case has nothing to do with restrictions on speech. It goes without saying that all students are free to organize, to promote their ideas, and to seek by all legal means to persuade others that their views are correct. . . .").

Other aspects of the mandatory student fee which the students do not challenge include: the Regents' authority to collect student activity fees; the Regents' use of the nonallocable portion of the student activity fee; the Regents' use of the allocable portion of the student activity fee to fund the student government; the Regents' use of the allocable portion of the student activity fee to fund private organizations which do not engage in political or ideological speech, activities, or advocacy; the Regents' use of the allocable portion of *non-objecting* students' activity fees to fund private organizations engaging in political or ideological speech, activities, or advocacy; or the Regents' use of the allocable portion of the student activity fee to fund the student newspaper, or the Distinguished Lecture Series.

This leaves a very limited constitutional question: whether the Regents can force objecting students to fund private organizations which engage in political and ideological activities, speech, and advocacy. The district court concluded that they could not, and granted the plaintiffs declaratory and injunctive relief. We begin by considering the declaratory relief.

II. ANALYSIS

A. Declaratory Judgment

The district court entered a declaratory judgment that "the defendants' use of the mandatory segregated fees to support political and ideological activities violates the First Amendment to the United States Constitution, . . ." The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

The Supreme Court has long recognized two necessary corollaries to the First Amendment's guarantee of free speech: the right not to speak, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943); and the right not to be compelled to subsidize others' speech, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). It is based on these familiar corollaries, and specifically *Abood* and *Keller*, that the plaintiffs challenge Wisconsin's mandatory student fee policy.

The Supreme Court has yet to determine whether these First Amendment corollaries protect objecting students from being forced by state universities to subsidize private political and ideological organizations. However, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Supreme Court provided guidance on the appropriate analysis for such a challenge. In *Rosenberger*, students who published a Christian newspaper at the University of Virginia challenged the university's denial of their request for funding from the university's mandatory student activity fees. Although the university had used student fees to pay for printing costs for non-religious newspapers, the university denied the plaintiffs' request because of the newspaper's religious viewpoint. *Id.* at 825-27. The Supreme Court held that the student activity fees created a fora of money and that once established the fora had to be made available on a viewpoint-neutral basis. Because the University of Virginia discriminated based on the religious viewpoint of the newspaper, it had violated the First Amendment.

While *Rosenberger* did not consider the question we have before us, in noting what was not before it, the Court directed us to the *Abood* and *Keller* analysis:

> The fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. *See Keller v. State Bar of California*, 496 U.S. 1, 15-16 (1990); *Abood v. Detroit Board of Ed.*, 431 U.S. 209, 235-236 (1977).

Id. at 840. See also, Rosenberger, 515 U.S. at 851 (O'Connor, concurring) ("Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1, 15 (1990); *Abood v. Detroit Board of Education*, 431 U.S. 209, 236 (1977).").[3]

Not only does *Rosenberger* direct us to *Abood* and *Keller*, but every other circuit to have considered the constitutional uses of mandatory student activity fees has applied the *Abood* and *Keller* analysis (although the circuits are split on how exactly the analysis applies). *Galda v. Rutgers*, 772 F.2d 1060, 1063-64 (3d Cir. 1985); *Carroll v. Blinken*, 957 F.2d 991, 997 (2d Cir. 1992); *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992); *Kania v. Fordham*, 702 F.2d 475, 479-80 (4th Cir. 1983). *See also, Smith v. Regents of the University of California*, 844 P.2d 500, 511 (Cal. 1993) (applying the *Abood* and *Keller* analysis). Given the Supreme Court's lead and the overwhelming authority from other circuits, the issue before us is properly reviewed under the authority of *Abood* and *Keller*.

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[3] The Regents try to shoehorn this case into *Rosenberger*. However, as the Court made abundantly clear, it considered only the disbursement of student activity fees; it did not consider the constitutionality of forcing students to fund private political and ideological organizations. *Rosenberger*, 515 U.S. at 840.

In *Abood*, 431 U.S. 209, employees of the Detroit Board of Education challenged the constitutionality of an agency-shop agreement which required teachers who did not join the union to pay a service fee to the union. The teachers argued that this mandatory fee violated their First Amendment rights to free speech and free association. The Supreme Court held that the Board of Education could compel non-union teachers to pay the service fee, explaining that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.* at 222. Thus, so "long as [the union 3] act[s] to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Id.* at 223.

The Court continued, clarifying its holding:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes *not germane to* its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

Id. at 235-36 (emphasis added).

Thirteen years later in *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Supreme Court revisited the issue of compelled funding. In *Keller*, a group of lawyers challenged the use of mandatory state bar dues to fund lobbying on social issues. The Supreme Court began by explaining *Abood*:

> *Abood* held that unions could not expend a dissenting individual's dues for ideological activities not *germane* to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Id. at 13-14.

From *Keller's* holding ("The State Bar may therefore constitutionally fund activities *germane to* those goals. . . .", 496 U.S. at 13) and *Abood's* qualification (the Constitution requires that expenditures for ideological cause *not germane* be financed by voluntary funds, 431 U.S. at 235), courts have named the analysis born of *Abood* the "germaneness analysis."[4] Yet *Abood* did not provide much guidance as to its actual application. *Keller* did more by setting forth guidelines for determining permissive expenditures: "[T]he guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 14 (quoting *Lathrop v. Donohue,* 367 U.S. 820, 843 (1961) (plurality opinion)). But *Keller* still left many lines to be drawn.

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[4] Actually, the concept of "germaneness" derived from *Railway Employees v. Hanson,* 351 U.S. 225, 235 (1956), wherein the Supreme Court held that only expenditures "germane to collective bargaining" were chargeable to dissenting employees under the Railway Labor Act (as opposed to the First Amendment).

Beyond *Abood* and *Keller,* the Supreme Court has addressed the issue of germaneness in several other cases. *Chicago Teachers Union v. Hudson,* 475 U.S. 292 (1986); *Ellis v. Brotherhood Railway Clerks,* 466 U.S. 435 (1984); *International Ass'n of Machinists v. Street,* 367 U.S. 740 (1961). The most significant development came in *Lehnert v. Ferris Faculty Assn.,* 500 U.S. 507 (1991). In *Lehnert,* the Supreme Court considered the constitutionality of various union expenditures under the germaneness analysis originating in *Abood* and *Keller.* However, in doing so, *Lehnert* explained that this required a three-prong analysis for determining whether union expenditures violated the objecting employees' First Amendment rights: To be constitutional, the expenditure must be "germane to collective bargaining; justified by the government's vital policy interest in labor peace and avoiding 'free-riders'; and not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519. The Supreme Court recently reaffirmed this test. *Air Line Pilots Assoc. v. Miller,* 118 S.Ct. 1761 (1998).

Lenhert's three-prong analysis is the test today. And as *Lenhert* holds, there is more to the germaneness analysis than whether the activity is germane to the governmental interest, but because "germaneness" is the first prong, we begin there.

1. ***Germaneness.***

Under *Lehnert,* the first prong considers whether the mandatory fee is germane to some otherwise legitimate government scheme, in that case collective bargaining. This prong really presents two questions: initially whether there is some otherwise legitimate governmental interest justifying any compelled funding; and then whether the specifically challenged expenditure is germane to that interest. We need not answer the initial question because the students do not contend that the Regents lack a legitimate interest in the

compelled funding of the student government or student organizations.

That leaves the second question: whether the challenged activity is germane to the government's asserted interest. Here the Regents assert an interest in education. They then contend that funding private organizations which engage in political and ideological activities is germane to education because the funding allows for more diverse expression and this in turn is educational. *See reply brief* at 2 ("[E]xpression of diverse viewpoints is germane to the educational mission of the UW-Madison.").

However, "germaneness" cannot be read so broadly as to justify the compelled funding of private organizations which engage in political and ideological advocacy, activities and speech. For example, in *Keller,* the State Bar defended its funding of lobbying on nuclear weapons, abortion, and prayer in public schools arguing that it was authorized to fund activities "in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." 496 U.S. at 15. The Supreme Court rejected such an over-encompassing reading of germaneness, holding instead that expenditures "to endorse or advance a gun control or nuclear weapons freeze initiative," clearly fell at "the extreme end[ ] of the spectrum" of expenditures not germane and therefore unconstitutional. *Id.* at 15-16.

In *Lehnert* the Supreme Court again rejected a broad interpretation of "germaneness." *Lehnert* involved a challenge to the union's use of dues to fund lobbying related to financial support of the employee's profession or public employees generally. The Court held that "[w]here, as here, the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection

to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees."[5] 500 U.S. at 520 (plurality). The Court further concluded "that the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." *Id.* at 522 (plurality).

In these cases, the Supreme Court rejected arguments that political and ideological speech is germane to the governmental interest involved. In fact, in *Lehnert,* the Supreme Court stated that germaneness cannot be read so broadly in the context of a private sector union as to *"include political or ideological activities." Id.* at 516 (emphasis added). *See also, Ellis,* 466 U.S. at 452 (holding that while union activities in question may benefit collective bargaining, the benefits were too attenuated to be germane).

Similarly, here germaneness cannot be read so broadly as to include forced funding of private political and ideological groups. The private groups are voluntary and may be open to both students and non-students alike. Many of the groups mirror organizations which exist outside of the University setting (for example, WISPIRG, the UW Greens, the International Socialist Organization, and Amnesty International all have non-university counterparts). And

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[5] In *Lehnert,* five justices adopted the three-prong analysis set forth above, although only four of those five justices agreed on the application of the factors; four justices believed that the challenged lobbying was not germane to collective bargaining, while one justice thought that it was. That is nonetheless the Court's holding. *Marks v. United States,* 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'. . . .") (internal citation omitted). The remaining four justices also concluded that the lobbying activities could not be financed, but applied a "statutory duties test" instead of the three-prong analysis. *Lehnert,* 500 U.S. at 558 (Scalia, concurring in part, dissenting in part).

most of the private student groups (over 70%) do not even apply for funding, showing that the funding is not even germane to the private organizations' existence, much less germane to education. Moreover, unlike, for example, a political science class on socialism, the International Socialist Organization is only incidentally concerned with education. Its primary goal is the promotion of its ideological beliefs. The fact that some educational benefit may come from it is secondary, and therefore not sufficiently germane to overcome the objecting students' constitutional rights. The mere incantation of the rubric "education" cannot overcome a tactic, repugnant to the Constitution, of requiring objecting students to fund private political and ideological organizations.

To justify compelling objecting students to fund the private organizations, the Regents point to the expansive governmental interest they have—education—as compared to the limited interests involved in *Abood* and *Keller*—collective bargaining and oversight of the bar—and argue that because the interest is so broad, more activities are germane, including political and ideological activities. The Regents correctly recognize the breadth of "educational"; everything is in a sense educational (organizing a student activity, engaging in political and ideological speech, even choosing which political party or candidate to fund) even if it merely teaches you that you do not want to do it again. Yet when presented with a similarly expansive interest in *Keller*—the advancement of the law—the Supreme Court rejected such a broad reading of germaneness. *Keller,* 496 U.S. at 15-16 ("[T]o endorse or advance a gun control or nuclear weapons freeze initiative," clearly fell at "the extreme end[ ] of the spectrum" of expenditures not germane and therefore unconstitutional.). We therefore reject the Regents' argument.

The Regents also rely on *Carroll v. Blinken,* 957 F.2d 991 (2d Cir. 1992) *("Carroll I"),* and *Carroll v. Blinken,* 42

F.3d 122 (2d Cir. 1994) *("Carroll II"),* wherein the Second Circuit applied the "germaneness" analysis of *Abood* and *Keller* and held that a state university could constitutionally fund the New York Public Interest Research Group with students' activity fees even though some students disagreed with that speech "as long as that organization spends the equivalent of the students' contribution on campus and thus serves the university's substantial interests in collecting the fee."[6] 957 F.2d at 992. The plaintiffs respond by citing the contrary precedent of *Galda v. Rutgers,* 772 F.2d 1060 (3d Cir. 1985), wherein the Third Circuit applied the *Abood* and *Keller* "germaneness" analysis, and concluded that while the New Jersey Public Interest Research Group offered some educational benefits to students, such benefits were incidental to the organization's primary political and ideological purpose, and this incidental educational benefit did not justify the infringement of the dissenting students' speech and association rights:

> Although the training PIRG members may receive is considerable, there can be no doubt that it is secondary to PIRG's stated objectives of a frankly ideological bent. To that extent the educational benefits are only "incidental"—arising from or accompanying the principal objectives—and

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[6] *Carroll I* required that NYPIRG "spend[ ] the equivalent of the students' contribution on campus," 957 F.2d at 1002, while *Carroll II* refined the holding to require that NYPIRG spend the equivalent on "activities that foster a 'marketplace of ideas' on the [State University of New York] campus; (2) activities that provide SUNY Albany students with hands-on educational experiences; and (3) extra-curricular activities for SUNY Albany students, both on and off the Albany campus, that fulfill SUNY educational objectives." 42 F.3d at 128.

> subordinate to the groups' function of promoting its political and ideological aims.

Galda, 772 F.2d at 1065.

The students also rely on the California Supreme Court decision in *Smith v. Regents of the University of California,* 844 P.2d 500, *cert. den.,* 510 U.S. 863 (1993), which followed *Galda* and rejected *Carroll.* In *Smith,* students at the University of California at Berkeley challenged the school's mandatory activity fee which financed the student government and other student activity groups. The students claimed that using their fees to subsidize private organizations which engaged in political or ideological activities violated the First Amendment. The California Supreme Court held that:

> The principles that we derive from *Carroll* and *Galda,* as well as *Keller* and *Abood,* are these: A university may, in general, support student groups through mandatory contributions because that use of funds can be germane to the university's educational mission. At some point, however, the educational benefits that a group offers become incidental to the group's primary function of advancing its own political and ideological interests. To fund such a group may still provide some educational benefits, but the incidental benefit to education will not usually justify the burden on the dissenting students' constitutional rights. Phrased in terms of the tests that courts have applied, a regulation that permits the mandatory funding of such groups is not "narrowly drawn to avoid unnecessary intrusion on freedom of expression" and it "unnecessarily restrict[s] constitutionally protected liberty, [when] there is

> open a less drastic way of satisfying its legitimate interest."

Id. at 511 (internal citations omitted).

Were we to have to decide based solely on *Carroll, Galda,* and Smith, we would find *Galda* and Smith's analyses and conclusions more persuasive, and we would conclude that funding of political and ideological speech of private organizations is not germane to the university's mission.[7] But our decision is not confined to lower court analyses. Rather, we have the Supreme Court's guidance on interpreting "germaneness," and the Court's example, *see supra* 14-17, counsels against adopting the broad reading of "germaneness" which *Carroll* took. However, even if germaneness could be read as broadly as the Regents suggest and the Second Circuit allowed, and we (along with the Third Circuit and the California Supreme Court) are wrong in our assessment of the germaneness of a University's funding of private political and ideological groups to education, the Regents would be less than halfway home. As *Lehnert* made clear, "germaneness" is not the be-all/end-all question in the constitutional analysis, but rather is only the first prong: Under *Lehnert,* not only must the mandatory fee be germane to some otherwise legitimate economic or regulatory scheme, the compelled funding must also be justified by vital interests of the government, and not add significantly to the burdening of free speech inherent in achieving those interests. Yet *Carroll* did not consider these additional requirements, and in a case such as this involving the forced funding of political

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[7] *Galda* (and *Carroll* for that matter) involved limited challenges to compelled funding of PIRG, and did not address the specific question presented here. 772 F.2d at 1064. Nonetheless, we believe the same analysis should govern private student organizations.

and ideological speech, those factors obtain the utmost significance.[8]

2. ***Vital policy interests of the government.***

The second prong under *Lehnert* considers whether the compelled fee is justified by vital policy interests of the government. *Lehnert,* 500 U.S. at 520. In the context of unions, those policy interests included both labor peace and avoiding free riders, and with the bar "the state's interest in regulating the legal profession and improving the quality of legal services" justified the compelled association inherent in the integrated bar. *Keller, 496 U.S.* at 13-14. While the Regents do not address this prong,[9] through out this appeal the Regents have focused on their interest in education. The Regents also speak of the government's interest in shared governance, or in other words the interest in allowing students to share in the running of the Wisconsin University System.

No doubt there is a vital interest in education, and the government has an interest in allowing students to share the governance of the university system (although whether the latter interest is also "vital" is not clear). However, for the vital policy interest to survive scrutiny under *Lehnert,* it must justify *compelled* funding of the private or quasi-private activity. Neither of these interests presents a vital interest in

[8] The Regents also cite *Hays County Guardian v. Supple,* 969 F. 2d 111, 123 (5th Cir. 1992), and *Kania v. Fordham,* 702 F. 2d 475, 481 (4th Cir. 1983). These cases held that a university could constitutionally fund student newspapers with mandatory student activity fees. We need not consider the correctness of those decisions because the plaintiffs have not challenged the funding of the student newspaper.

[9] The Regents fail to consider the latter two prongs of *Lehnert* (arguably waiving the argument—in fact the Regents do not even cite *Lehnert* in their briefs on appeal). We nonetheless proceed with this analysis, as set forth by the Supreme Court.

compelling students to fund private organizations which engage in political and ideological speech. Again, *Lehnert,* 500 U.S. at 521, illustrates this.

In *Lehnert* non-union members challenged various union expenditures, including "lobbying activities related not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally . . . ." *Id.* at 522 (plurality). In determining the constitutionality of these expenditures, a plurality of the Court analyzed the vital policy interests involved—labor peace and preventing free riders—and concluded "[l]abor peace is not especially served by . . . charging objecting employees for lobbying, electoral and other political activities that do not relate to their collective-bargaining agreement." *Id.* at 521. *Lehnert* further explained that labor peace would not be furthered: "[B]ecause worker and union cannot be said to speak with one voice, it would not further cause harmonious industrial relations to compel objecting employees to finance union political activities as well as their own." *Id.*

While labor peace is not at issue here, the above quotation illustrates the importance of a common cause for justifying the compelled funding. In the context of union cases, where the union and non-union members share a common cause, a vital policy interest justified the compelled funding. But where that was missing, the expenditure could not be justified. In this case while there may be a common cause in education and shared governance, there is no common cause between private organizations which engage in political and ideological speech and the objecting students. Thus, we see no vital policy interest supporting compelled funding of the private associations. And we might even conclude that far from *serving* the school's interest in education, forcing objecting students to fund objectionable organizations undermines that interest. In some courses students are likely taught the values of individualism and

dissent. Yet despite the objecting students' dissent they must fund organizations promoting opposing views they don't graduate.

The Regents also speak of a "free-rider" problem, claiming that because private organizations must open their activities to all students, allowing objecting students to withhold funding would result in a free-rider problem similar to that acknowledged as a vital policy interest in *Abood.* Where, as here, the Regents' own policy allows non-students to join registered student organizations and attend campus activities, they cannot legitimately claim a concern over free riders. Most student organizations subject to this open-access policy receive no funds. Free riders might more accurately describe those organizations that receive a share of the mandatory fees.

Even if objecting students were labeled free riders, the basis underlying the free-rider concern in *Abood is* absent there. In *Abood,* in holding that an employee's free speech rights are not unconstitutionally burdened because the employee opposes positions taken by a union in its capacity as collective-bargaining representative, the Court clearly recognized that to hold otherwise would create a free-rider problem. The *reason* a free-rider problem exists in the context of unions, however, is significant (and in the case of student organizations lacking): In the case of unions, the government has imposed on unions the duty to fairly represent all employees, including those who do not belong to the union, and these legal requirements "often entail expenditure of much time and money." 431 U.S. at 221. Forcing non-union employees to fund the union's collective bargaining agreement thus "counteracts the incentive that employees might otherwise have to become free riders—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 222.

Conversely, here the private organizations which the plaintiffs object to funding do not act in a representative capacity for the students and have no obligation to fairly represent the students, as the union does for non-union members. Rather, the private organizations' advocacy and speech further positions espoused by the organizations and their members. The political and ideological activities of private organizations are not limited to the university setting, and have ramifications that extend into the diverse aspects of the student's life. In fact, many of the ideological and political activities and speech to which the plaintiffs object occurred off-campus, further limiting the benefit to objecting students. These differences make the free-rider concern inapplicable here.[10] *See also Ellis,* 466 U.S. at 452 (holding that the union could not force non-union employees to fund the recruitment of workers outside the bargaining unit because it did not implicate a free-rider concern: "the free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members. Non-bargaining unit organization is not directed at the employee."); *Lehnert,* 500 U.S. at 521 (rejecting union's free-rider justification for lobbying expenditures, holding that the free-rider concern is inapplicable because "[t]he balancing of monetary and other policy choices performed by legislatures is not limited to the workplace but typically has ramifications that extend into diverse aspects of an employee's life.").

3. Burdening of free speech.

Even if the Regents could satisfy the first and second prongs, they cannot satisfy *Lehnert's* third and final prong by

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[10] The Regents also seem to argue that because all students benefit from "robust debate," the objecting students are also free riders. While arguably non-speakers benefit from the additional speech, that is not enough: "[P]rivate speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for." *Lehnert,* 500 U.S. at 556 (Scalia, concurring).

proving that the forced funding does not "significantly add[ ] to the burdening of free speech inherent in achieving those interests." This prong recognizes that any time the government forces individuals to fund private organizations, a burden on free speech and association may incidentally result, but that burden may be justified by an important governmental interest. Assuming there is a vital governmental interest in funding (which we have concluded there is not), the question then becomes whether a specific expenditure adds to the burden on speech inherent in the mandated funding of the organization in the first instance. If it does, funding those expenditures cannot constitutionally be required even if it is germane to an organization's mission.

In determining whether using compelled fees to fund a private organization which engages in political and ideological activities "significantly adds to the burdening of free speech," we are again guided by *Lehnert*. In *Lehnert*, the Court held that funding political lobbying and using objecting employees' funds to garner public support "present[s] additional 'interference with the First Amendment interests of objecting employees.'" 500 U.S. at 521-22 (internal citation omitted). In doing so, the Court explained:

> [t]he burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context. By utilizing petitioners' funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable. *[Wooley v.] Maynard, 430 U.S.* 705, 715 (1977). The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion. Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible.

Id. at 522 (plurality). The Court further explained that "[a]though First Amendment protection is in no way limited to controversial topics or emotionally charged issues, the extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will effect." *Id.* at 521-22. If there was any doubt, *Lehnert* makes clear that the Regents' policy cannot stand. Here the burden on objecting students' speech "is particularly great"; the private organizations use the funds to "garner the support of the public in its endeavors," and as "an instrument for fostering public adherence to an ideological point of view" which the students find objectionable. "The degree of impingement upon free expression that the compulsion will effect" is also especially severe given the extent and source of the students' disagreement with the speech engaged in by the organizations which receive their fees. In this case, the speech to which the plaintiffs object includes such emotionally charged issues as abortion, homosexuality, and the United States' democratic system. The source of the plaintiffs' disagreement, as explained at length in their affidavits, is their deeply held religious and personal beliefs.

Notwithstanding these deep-seated beliefs, the Regents attempt to justify forcing the objecting students to fund these organizations because without funding less speech will result, and less controversial speech, and according to the Wisconsin Assistant Attorney General at oral argument, "hateful speech has a place in our society too." That may well be true, but the Constitution does not mandate that citizens pay for it. *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983) ("Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such

funds as may be necessary to realize all the advantage of that freedom.' "). *See also,* Thomas Jefferson, Notes on the State of Virginia 233 (2d Amer. ed., 1794) ("[I]t is error alone which needs the support of government. Truth can stand for itself."). In fact it guarantees the opposite—that "we the people" will not be compelled to pay for such speech: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood,* 431 U.S. at 234-35 n.31 (quoting Irving Brant, *James Madison: The Nationalist* (1948)). Yet that is exactly what the Regents do, and to support this policy they again point to the educational benefits flowing from the very speech to which the plaintiffs so strenuously object. That by its nature is an interest in the compelled funding of private

speech, which "significantly adds to the burdening of free speech.[11]

One of the Supreme Court's more recent compelled funding cases, *Glickman v. Wileman Bros. & Elliott,* 117 S.Ct. 2130 (1997), confirms our conclusion. In *Glickman,* a number of growers, handlers, and processors ("respondents") of California tree fruits challenged the constitutionality of various regulations contained in marketing orders which the Secretary of Agriculture promulgated pursuant to the Agricultural Marketing Agreement Act of 1937. The orders at issue imposed assessments on the respondents that covered the costs of administrative expenses and included the cost of generic advertising of California nectarines, plums, and peaches. The respondents argued to the Supreme Court that

[11] The compulsion which Madison condemned is of heightened concern following *Rosenberger*, 515 U.S. 819 (1995), because under *Rosenberger* it would seem that if the university opens up funding to private organizations it must fund not only the Socialists and the Greens, but the Republicans, the Democrats, the KKK, Nazis, and the skinheads; the Nation of Islam, the Christian Coalition, and Catholic, Protestant, Jewish, and Islamic organizations. To others, this engenders a "crisis of conscience." For example, when a Christian campus group sought an ASM operations grant, the Ten Percent Society opposed it, contending that it would be illegal and unconstitutional to fund the proselytizing and anti-homosexual advocacy of this Christian organization.

If the university cannot discriminate in the disbursement of funds, it is imperative that students not be compelled to fund organizations which engage in political and ideological activities—that is the only way to protect the individual's rights. The Regents themselves recognized this important First Amendment concern in passing the University of Wisconsin Financial Policy and Procedure Paper No. 20 which prohibited the use of student activities fees to fund "activities that are politically partisan or religious in nature." As the Regents explained in their reply brief: "The UW-Madison, like the University of Virginia whose policy was challenged in *Rosenberger*, believed at the time that the policy was adopted that it was required to protect students' rights under the First Amendment." The Regents properly recognized the need to protect objecting students' rights under the First Amendment, and that need still exists following *Rosenberger*—in fact it is now more acute.

compelled funding of such generic advertising abridged their First Amendment rights. In a 5-4 decision, the Supreme Court upheld the marketing orders. In upholding the assessment, the Supreme Court relied on

> three characteristics of the regulation scheme at issue to distinguish it from laws that [the Court has] found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, *they do not compel the producers to endorse or to finance any political or ideological views.* (Citing *Abood* and *Keller.)*

Id. at 2138.

The third characteristic, that the assessment does "not compel the producers to endorse or to finance any political or ideological views," *id.*, proved of the utmost significance to the Court's ruling. Throughout its opinion, the Court reiterated the last distinction—that the orders "do not compel the producers to endorse or to finance any political or ideological views." *See, e.g., id.* at 2140 (the germaneness test is clearly satisfied because the generic advertising is unquestionably germane to the purposes of the marketing orders and "in any event, the assessments are not used to fund ideological activities."). In fact, the Court used the *absence* of political and ideological speech to distinguish *Abood*:

> However, *Abood,* and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest in not being compelled to contribute to an

> organization whose expressive [activities] conflict[ ] with one's "freedom of belief." . . . Relying on our compelled speech cases, however, the Court found that compelled contributions for political purposes unrelated to collective bargaining implicated First Amendment interests because they interfere with the values lying at the "heart of the First Amendment—the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." (quoting *Abood*, 431 U.S. at 234-35). Here, however, requiring respondents to pay the assessments cannot be said to engender any crisis of conscience.

Id. at 2139.

The very factors the Court used to distinguish *Abood*, however, in this case compel the opposite result. The students, like the objecting union members in *Abood,* have a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's "freedom of belief." *Glickman*, 117 S.Ct. at 2139. And here, unlike *Glickman*, requiring the students to pay the mandatory student activity fees does engender a crisis of conscience. *Glickman*, 117 S.Ct. at 2130. Finally, in the words of the *Glickman* Court: "compelled contributions for political purposes . . . implicated First Amendment interests because they interfere with the values lying at the 'heart of the First Amendment[-]the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.'" *Id.* at 2139

(quoting *Abood,* 431 U.S. at 234-35).[12] In essence, allowing the compelled funding in this case would undermine any right to "freedom of belief." We would be saying that students like the plaintiffs are free to believe what they wish, but they still must fund organizations espousing beliefs they reject. Thus, while they have the right to believe what they choose, they nevertheless must fund what they don't believe.

The Regents respond with a barrage of arguments, none of which have merit, or merit much attention. First, the Regents contend that the district court improperly applied a mixed strict-scrutiny/germaneness analysis. The district court did intermingle these two tests. However, we review this case de novo and have applied the *Lehnert* analysis, so any error on the district court's part is harmless.[13]

The Regents next argue that there is no evidence that the student activity fees were used to fund the actual political or ideological activities the organizations promoted. However, the Supreme Court rejected this argument in *Abood*, 431 U.S. at 237 n.35 (holding that "[it is plainly not an adequate remedy to limit the use of the actual dollars collected from dissenting employees to collective-bargaining purposes"). Therefore, whether or not the student fees directly fund the political or ideological activities is irrelevant; the First

[12] In *Glickman,* four justices concluded that the First Amendment protects against the government compelling individuals to fund private speech *whether or not the speech at issue is political or ideological.* 117 S.Ct. 2147 (Souter, dissenting). So in *Glickman*, all nine justices rejected as unconstitutional the compelled funding of political and ideological views.

[13] Conversely, the plaintiffs assert that strict scrutiny is the correct standard of review. However, because the plaintiffs win under the *Lehnert* analysis, the plaintiffs cannot complain as to the standard of review. Moreover, while the *Lehnert* analysis derived by the Supreme Court from *Abood* and *Keller* appears to be the appropriate test (as recognized by *Rosenberger*), we note that the Regents' policy also cannot survive the more exacting strict scrutiny standard.

Amendment is offended by the Regents' use of objecting students' fees to subsidize organizations which engage in political and ideological activities. This also means that the Regents cannot earmark the objecting students' activity fees to fund non-political organizations and then continue to distribute the same amount of funding to the political and ideological organizations albeit with funds in "name" paid by non-objecting students. This too is merely a bookkeeping matter, with the end result being that the objecting student subsidizes the political and ideological activities of the organization. *Abood,* 431 U.S. at 237 n.35. The dollars are fungible and splitting the same amount in two directions does not cure the obvious subsidy.

The Regents next argue that because the organizations do not purport to speak for all students, the First Amendment is not violated. This is irrelevant. The First Amendment protects the right to free speech and the corresponding right not to be compelled to fund private speech. These rights are premised on an individual's freedom to say what he wants to say and conversely not say what he does not want to say. It matters not whether a third party attributes the private organization's political and ideological views to the objecting student.

The Regents also attempt to distinguish this case from *Abood* and *Keller* by arguing that here the objecting students can work through the democratic process, whereas in the union and bar association cases that remedy was not available. While it is true that the teachers in *Abood* were not members of the union, and therefore did not have a role in electing union leaders, in *Keller* the objecting attorneys were required to be members of the state bar association and therefore were able to work within the democratic system. Given that *Keller* did not distinguish itself from *Abood* on this basis, we won't either. Actually, there is a more basic flaw in the Regents' reliance on the democratic nature of student representation: The First Amendment trumps the

democratic process and protects the individual's rights even when a majority of citizens wants to infringe upon them.[14]

Finally, the Regents rely on *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Libertarian Party of Indiana v. Packard*, 741 F.2d 981 (7th Cir. 1984), to argue that as the government they can use the student activity fees to fund private organizations even if those organizations engage in political and ideological activities and speech. However, both those cases involved the legislature's appropriation of public funds raised through taxation. In *Buckley*, Congress appropriated income tax revenue to fund political organizations, while in *Libertarian Party* Indiana's legislature appropriated money generated by what in effect constituted a sales tax. 741 F.2d at 990. The student activity fee, however, does not equate to a tax. *Rosenberger* made this clear, stating that "the $14 paid each semester by the students is not a general tax designed to raise revenue for the University. . . . Our decision, then, cannot be read as addressing an expenditure from a general tax fund." *Rosenberger*, 515 U.S. at 841. *See also,* 515 U.S. at 851-52 (O'Connor, concurring) ("The Student Activities Fund, then represents not government resources, whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students."). Therefore, *Buckley* and *Libertarian Party* are inapposite.

In sum, we conclude that the *Abood* and *Keller* analysis, as explained in *Lehnert,* governs the students' First Amendment challenge of the Regents' mandatory student fee policy. The Regents have failed to sustain their burden under this three-prong analysis; even if funding private political and ideological organization is germane to the university's mission, the forced funding of such organizations

[14] Also, what good does it do objecting students to work within the democratic process? Even if the objecting students run for, or obtain representation on the ASM, once there they cannot defund organizations whose viewpoint they opposed. *Rosenberger*, 515 U.S. at 833.

significantly adds to the burdening of the students' free speech rights. Therefore, the Regents cannot use the allocable portion of objecting students' mandatory activity fees to fund organizations which engage in political or ideological activities, advocacy, or speech. We also hold that the 18 challenged private organizations engage in ideological and political activities and speech, and cannot be constitutionally funded with objecting students' fees.[15]

B. Injunctive Relief

The district court ordered "that the defendants, their officers, employees and other agents shall forthwith cease the funding of private groups that engage in ideological or political advocacy." The district court further ordered that the Regents publish written notice of organizations engaging in political or ideological speech, and the pro rata share of mandatory fees devoted to these organizations, and that the Regents establish an arbitration proceeding for disputes over the amount of fees paid and the nature of the organizations involved.

In issuing the injunction, the district court properly rejected the Regents' proposed procedure for compliance a refund mechanism. In *Ellis*, 466 U.S. at 443-45, the Supreme Court held (in the union context) that a pure rebate approach inadequately protects the constitutional rights of objecting employees:

> By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope

[15] As a result of our decision, we need not consider what the association clause of the First Amendment would add to the students' claim. We also need not consider the plaintiffs' free exercise claim, which was dismissed by the district court as moot.

> of the statutory authorization. The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but respondents did not do so. Even then the union obtains an involuntary loan for purposes to which the employee objects.

In arguing in support of the refund mechanism, the Regents assert various administrative problems, and contend that it will be impossible to determine the appropriate refund, given that each year the student government determines the level of funding of various activities. But these same administrative burdens face unions and bar associations, and yet the Supreme Court has refused to allow a rebate system to stand: "The only justification for this union borrowing would be administrative convenience. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily." *Id. See also, Hudson*, 475 U.S. at 305 ("[A] remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that the dissenters' funds may be used temporarily for an improper purpose. For, whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear.")[16]

[16] *Hudson* also made clear that nonmembers must be provided adequate information about the basis for the proportionate share, and "given sufficient information to gauge the propriety of the union's fee," and that the union must provide for a reasonably prompt decision by an impartial decision maker concerning the propriety of the fees. Recently, the Supreme Court reaffirmed these procedural protections in *Air Line Pilots Association v. Miller*, 118 S.Ct. 1761 (1998), while also holding that objectors need not exhaust an arbitration remedy before bringing claims in a federal court, unless they had agreed to do so. These same constitutional requirements apply equally to the University of Wisconsin.

But we agree with the Regents that the order is overbroad in some respects. The district court's order enjoining the university from "funding private groups that engage in ideological or political advocacy" applies to both objecting students and non-objecting students, but the plaintiffs pursued only a challenge to contributions made with objecting students' fees. Similarly, the district court's mandate that the Regents "may use mandatory segregated fees *only* for activities reasonably intended to promote its educational mission by providing opportunities and fora for the free expression of diverse viewpoints," fails to limit itself to those fees paid by objecting students. Moreover, the plaintiffs in this case did not argue that the Regents cannot use *any* mandatory segregated fees to fund student activities-they only objected to the use of objecting students' fees, and then only to fund organizations which engage in their own political and/or ideological speech, activities, and advocacy. They did not object to the use of student fees to fund services or student activities which do not involve political or ideological speech and advocacy. Because this portion of the injunction, as worded, goes too far, it cannot stand.[17]

The injunction also establishes rather detailed and specific procedures which the Regents must undertake to administer the distribution of mandatory student activity fees. While it is appropriate to issue an injunction stating what the state cannot do, federalism requires caution in ordering states what to do. We recognized this point in *ACORN v. Edgar*, 56 F.3d 791, 797 (7th Cir. 1995). In *ACORN*, the district court entered an injunction which enjoined state officials from refusing to comply with the law, but also set forth specific details in the form of a mandatory injunction. We concluded

[17] The declaratory judgment likewise included this overbroad language, and to the extent it is inconsistent with our holding today, it is also vacated. For clarity, we again stress that the fees need not be directly used for the political or ideological activities; the Regents cannot use the objecting students' funds to subsidize organizations which engage in political and ideological activities.

that the injunction "failed to exhibit an adequate sensitivity to the principle of federalism," *id.* at 798, explaining that "federal judicial decrees that bristle with interpretive difficulties and invite protracted federal judicial supervision of functions that the Constitution assigns to state and local government are to be reserved for extreme cases of demonstrated noncompliance with milder measures." *Id.* We then reversed the injunction stating that "until it appears that the state will not comply with [an injunction commanding compliance with the law, there is no occasion for the entry of a complicated decree that treats the state as an outlaw and requires it to do even more than the 'motor voter' law requires." In other words, detailed mandatory injunctions "are last resorts, not first." *Id.*

Moreover, "[w]hile a district court has wide discretion in fashioning a remedial injunction, such discretion is not without constraints. Prominent among these restraints is the principle of federalism: 'federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs. . . .'" *Consumer Party v. Davis,* 778 F.2d 140, 146 (3d Cir. 1985). Considerations of comity and federalism require that injunctive relief against a state be no broader than necessary to remedy the constitutional violation. *Lewis v. Casey,* 518 U.S. 343, 362-63 (1996). *See also Clark v. Coye,* 60 F.3d 600, 604 (9th Cir. 1995) ("[I]n reviewing a district court's injunction against an agency of state government, we scrutinize the injunction closely to make sure that the remedy protects the plaintiffs' federal constitutional and statutory rights but does not require more of state officials than is necessary to assure the compliance with federal law."); *Toussaint v. McCarthy,* 801 F.2d 1080, 1087 (9th Cir. 1986) ("[I]njunctive restraints that exceed constitutional minima must be narrowly tailored to prevent repetition of proved constitutional violations, and must not intrude unnecessarily on state functions."). This is especially true in the context of education, which by its very nature is a local concern.

The district court's injunction went much further than enjoining the Regents from using objecting students' mandatory activity fees to fund organizations which engage in political and ideological activities—the injunction set forth detailed measures which the Regents must undertake. Because the Constitution does not mandate this exact procedure, and because the state has not yet refused to comply with a general negative injunction saying what the State cannot do—paragraphs two through five of the injunction cannot stand.

In addition to the above issues regarding the injunction, the plaintiffs contend that the injunction should have specifically provided that each individual student, and not the University, "must have the final decision as to whether to fund an advocacy group or not before any fees are paid to the University," and that "[t]he University may not define private groups' advocacy as a 'service' to other students in order to require students to fund those groups." We do not think that the district court erred by failing to specifically state the above. However, we reiterate that under our holding above, the University cannot even temporarily collect from *objecting* students the portion of the fees which would fund organizations which engage in political and ideological activities, speech, or advocacy, whether or not the organization also provides some a service in doing so.

III. CONCLUSION

Under the *Lehnert* analysis, the Regents' mandatory student fee policy cannot stand. Funding of private organizations which engage in political and ideological activities is not germane to a university's educational mission, and even if it were, there is no vital interest in compelled funding, and the burden on the plaintiffs' First Amendment right to "freedom of belief" outweighs any governmental interest. We therefore hold that the Regents

cannot use the allocable portion of objecting students' mandatory activity fees to fund organizations which engage in political or ideological activities, advocacy, or speech, and they are hereby enjoined from doing so. The Regents, however, are free to devise a fee system consistent with our opinion and Supreme Court precedent; we will not mandate one at this time.

AFFIRMED IN PART,
REVERSED IN PART,
VACATED IN PART.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT

Western District of Wisconsin

SCOTT HAROLD SOUTHWORTH, AMY SCHOEPKE and KEITH BANNACH, REBECKA VANDER WERF and REBECCA BRETZ,

Plaintiffs,

v.

MICHAEL W. GREBE, SHELDON B. LUBAR, JONATHAN B. BARRY, JOHN T. BENSON, BRIGIT E. BROWN, JOHN BUDZINSKI, ALFRED S. DE SIMONE, LEE S. DREYFUS, DANIEL C. GELATT, KATHLEEN J. HEMPEL, RUTH MARCENE JAMES, PHYLLIS M. KRUTSCH, VIRGINIA R. MACNEIL, SAN W. ORR, JR., GERARD A. RANDALL, JR., JAY L. SMITH and GEORGE K. STEIL, SR.,

Defendants.

AMENDED JUDGMENT IN A CIVIL CASE

Case No.: 96-C-292-S

This action came for consideration before the court with District Judge John C. Shabaz, presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the defendants, their officers, employees and other agents shall forthwith cease the funding of private groups that engage in ideological or political advocacy.

IT IS FURTHER ORDERED that judgment is entered declaring that the defendants' use of the mandatory segregated fees to support political and ideological activities violates the First Amendment to the United States Constitution, with costs to plaintiffs.

IT IS FURTHER ORDERED that:

1. The Board of Regents of the University of Wisconsin System may use mandatory segregated fees only for activities reasonably intended to promote its educational mission by providing opportunities and fora for the free expression of diverse viewpoints, and all political or ideological activities must be supported by voluntary fees, user fees or some other source of revenue.

2. Prior to the beginning of each fiscal year the Board of Regents in concert with the students pursuant to Wis. Stats. 36.09(5) shall publish written notice of the activities that can and cannot be supported by the mandatory segregated fee. The notice shall set forth a student's pro rata fee to be devoted to activities that cannot be supported by the mandatory segregated fee. The notice shall be sent to students with their tuition statement. A plaintiff or similarly situated student may withhold the pro rata portion of the student fees budgeted for activities that cannot be supported by the mandatory segregated fee.

3. A plaintiff or student similarly situated who contends that the amount of fees which can be withheld was incorrectly determined may deliver to the Board of Regents a written demand for arbitration. Any such demand shall be delivered within 30 days of receipt of the student's tuition statement.

4. If one or more timely demand for arbitration is delivered the Board of Regents shall promptly submit the matter to arbitration before an impartial arbitrator. All such demands for arbitration shall be consolidated for hearing. The costs of the arbitration shall be paid by the Board of Regents.

5. In the event the decision of the arbitrator results in an increased pro rata reduction of fees for students who have delivered timely demands for arbitration for the fiscal year, the Board of Regents shall offer such increased pro rata reduction to students enrolled at the University of Wisconsin System after the date of the arbitrator's decision.

IT IS FURTHER ORDERED that plaintiffs' motions to dismiss their pending state claims because they are barred by the Eleventh Amendment and their RFRA claims because RFRA is unconstitutional are GRANTED.

IT IS FURTHER ORDERED that because this Court has found the fee system unconstitutional in violation of the First Amendment right to free speech and association based on the compelling state interest standard plaintiffs' motion to reconsider the free exercise claim is DENIED and the order dismissing it as moot is AFFIRMED.

Approved as to form this 3rd day of September, 1997.

/s/ John C. Shabaz
John C. Shabaz
District Judge

/s/ Joseph W. Skupniewitz
Joseph W. Skupniewitz, Clerk

By Deputy Clerk _____ Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTT HAROLD SOUTHWORTH, AMY SCHOEPKE and KEITH BANNACH, REBECKA VANDER WERF and REBECCA BRETZ,

Plaintiffs,

MEMORANDUM AND ORDER
96-C-0292-S

v.

MICHAEL W. GREBE, SHELDON B. LUBAR, JONATHAN B. BARRY, JOHN T. BENSON, BRIGIT E. BROWN, JOHN BUDZINSKI, ALFRED S. DE SIMONE, LEE S. DREYFUS, DANIEL C. GELATT, KATHLEEN J. HEMPEL, RUTH MARCENE JAMES, PHYLLIS M. KRUTSCH, VIRGINIA R. MACNEIL, SAN W. ORR, JR., GERARD A. RANDALL, JR., JAY L. SMITH and GEORGE K. STEIL, SR.,

Defendants.

Pursuant to its Memorandum and Order dated November 29, 1996 this Court entered amended judgment in the above entitled matter as follows:

THAT JUDGMENT IS ENTERED DECLARING THAT DEFENDANTS' USE OF THE MANDATORY SEGREGATED

FEE TO SUPPORT POLITICAL AND IDEOLOGICAL ACTIVITIES VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, WITH COSTS TO PLAINTIFFS.

It could have provided that which the plaintiffs sought and been done with the matter. In the prayer for relief set forth in their complaint plaintiffs requested injunctive relief against THE REGENTS ordering them and all of their officers, employees and other agents to stop funding private groups that engage in ideological or political advocacy. The court believes in light of the comments from the Court of Appeals that this language may have sufficed. Regardless of its understanding that the parties had agreed to fashion their own remedy in the event a violation of plaintiffs' constitutional rights was found to exist, this Court without addressing an appropriate remedy could have provided the injunctive relief requested rather than the declaratory relief which it believed accomplished the same purpose. It is apparent, however, that the parties are poles apart in fashioning a remedy and once again this Court, or some other court, will be left to the business of addressing the ultimate remedy to be entered.

With this awareness, the Court entered the remedy it believed to be appropriate under the circumstances, utilizing the procedure which had previously been affirmed by the United States Court of Appeals for the Seventh Circuit in *Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th Cir. 1996). Not only do both parties object to this remedy but neither party agrees with the position of the other. The defendants suggest that in the event a remedy is required the University of Wisconsin will provide it without assistance from this Court. Not only does the University object to any injunctive relief whatsoever, but suggests that in the event a remedy should become necessary neither this Court's suggestion nor that of the plaintiffs should be adopted. Instead the University suggests a non-remedy where the plaintiffs

through a rather cumbersome procedure would make applications for refunds of those fees collected by the University and used to support political or ideological activities in violation of their First Amendment rights. In order to protect their First Amendment rights the plaintiff students would be required to request a refund at the beginning of each and every semester because the amount of the fee and the activities supported thereby would be subject to change.

On the other hand, plaintiffs have suggested that the University should be provided leeway to develop a plan which The Board of Regents believes meets the constitutional requirements expressed in this Court's November 29, 1996 order. Apparently plaintiffs were not aware of the defendants' suggested non-relief. As an alternative plaintiffs suggest an "opt-out" policy where students could select those activities which they wish to support, similar to the federal employees Combined Federal Campaign (CFC).

The Court's proposed remedy which it entered on July 23, 1997 is less intrusive and more workable than the alternatives suggested by the parties. It implements the declaratory relief as previously ordered by the Court in a manner which eliminates the continued involuntary use of student fees to support political and ideological activities in violation of the Constitution.

The University suggests that the Court's proposal is intrusive, overly broad and will not work because it in effect destroys the ability of the students to participate in the distribution of student fees which constitute substantial support for campus student activities as required by Wis. Stat. sec. 36 09(5). To the contrary, a simple reading of the proposed remedy offered by the Court does not in any way suggest that the legislative mandate of shared governance has been ignored or that students will be deprived of their right to

participate in fee disposition. Nonetheless, to remove any doubt, the Court amends its order to ensure that shared governance in the disposition of student fees is continued.

Regardless of the optimism suggested by plaintiffs that a reasonable remedy will be enacted by the University of Wisconsin Board of Regents this Court is of the opinion that its responsibility transcends that misguided optimism and regardless of its formerly held belief that no such remedy need be addressed, judgment will be amended to address those concerns brought to this Court's attention by the Court of Appeals.

Accordingly,

ORDER

IT IS ORDERED that the defendants, their officers, employees and other agents shall forthwith cease the funding of private groups that engage in ideological or political advocacy.

IT IS FURTHER ORDERED that judgment is entered declaring that the defendants' use of the mandatory segregated fees to support political and ideological activities violates the First Amendment to the United States Constitution, with costs to plaintiffs.

IT IS FURTHER ORDERED that:

1. The Board of Regents of the University of Wisconsin System may use mandatory segregated fees only for activities reasonably intended to promote its educational mission by providing opportunities and fora for the free expression of diverse viewpoints, and all political or ideological activities must be supported by voluntary fees, user fees or some other source of revenue.

2. Prior to the beginning of each fiscal year the Board of Regents in concert with the students pursuant to Wis. Stats. 36.09(5) sh ll publish written notice of the activities that can and cannot be supported by the mandatory segregated fee. The notice shall set forth a student's pro rata fee to be devoted to activities that cannot be supported by the mandatory segregated fee. The notice shall be sent to students with their tuition statement. A plaintiff or similarly situated student may withhold the pro rata portion of the student fees budgeted for activities that cannot be supported by the mandatory segregated fee.

3. A plaintiff or student similarly situated who contends that the amount of fees which can be withheld was incorrectly determined may deliver to the Board of Regents a written demand for arbitration. Any such demand shall be delivered within 30 days of receipt of the student's tuition statement.

4. If one or more timely demand for arbitration is delivered the Board of Regents shall promptly submit the matter to arbitration before an impartial arbitrator. All such demands for arbitration shall be consolidated for hearing. The costs of the arbitration shall be paid by the Board of Regents.

5. In the event the decision of the arbitrator results in an increased pro rata reduction of fees for students who have delivered timely demands for arbitration for the fiscal year, the Board of Regents shall offer such increased pro rata reduction to students enrolled at the University of Wisconsin System after the date of the arbitrator's decision.

IT IS FURTHER ORDERED that plaintiffs' motions to dismiss their pending state claims because they are barred by the Eleventh Amendment and their RFRA claims because RFRA is unconstitutional are GRANTED.

IT IS FURTHER ORDERED that because this Court has found the fee system unconstitutional in violation of the First Amendment right to free speech and association based on the compelling state interest standard plaintiffs' motion to reconsider the free exercise claim is DENIED and the order dismissing it as moot is AFFIRMED.

Entered this 3rd day of September, 1997.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTT HAROLD SOUTHWORTH, AMY SCHOEPKE and KEITH BANNACH, REBECKA VANDER WERF and REBECCA BRETZ,

Plaintiffs,

MEMORANDUM AND ORDER
96-C-0292-S

v.

MICHAEL W. GREBE, SHELDON B. LUBAR, JONATHAN B. BARRY, JOHN T. BENSON, BRIGIT E. BROWN, JOHN BUDZINSKI, ALFRED S. DE SIMONE, LEE S. DREYFUS, DANIEL C. GELATT, KATHLEEN J. HEMPEL, RUTH MARCENE JAMES, PHYLLIS M. KRUTSCH, VIRGINIA R. MACNEIL, SAN W. ORR, JR., GERARD A. RANDALL, JR., JAY L. SMITH and GEORGE K. STEIL, SR.,

Defendants.

Plaintiffs Scott Southworth, Amy Schoepke and Keith Bannach, each a student at the University of Wisconsin-Madison Law School, commenced this action against the Board of Regents of the University of Wisconsin System alleging that their mandatory segregated fee system violated their First and Fourteenth Amendment rights to freedom of speech, freedom of association, free exercise of religion, their rights under the Religious Freedom Restoration Act, 42

U.S.C. § 2000bb and Wisconsin state law. The parties filed cross motions for summary judgment. This Court denied defendants' motion and granted summary judgment in favor of plaintiffs finding that defendants' mandatory segregated fee system violated plaintiffs' First Amendment rights to freedom of speech and association. Because the Court found that the mandatory segregated fee system violated plaintiffs' First Amendment rights to freedom of speech and association, it did not reach the free exercise of religion, the Religious Freedom Restoration Act or the state law claims. The Court refrained from determining at summary judgment an appropriate injunctive remedy because plaintiffs' represented to it that the parties would resolve the remedy among themselves. Plaintiffs' motion for summary judgment and supporting papers specifically stated:

> This Court needs only to address the question of constitutional *liability* - whether the current mandatory fee system violates the Constitution. Plaintiffs believe that if this Court finds a constitutional violation, the parties can work out an acceptable *remedy* among themselves. If they can't reach agreement on a remedy, then the parties can return to this Court for its judgment on a proper remedy.

(emphasis in original). Pursuant to this representation the Court ordered that judgment be entered declaring that defendants' use of the mandatory segregated fee to support political and ideological activities violated the First Amendment and awaited the parties' submission of a stipulation concerning an acceptable remedy or return for the Court's determination of an appropriate remedy. The parties never agreed to an acceptable remedy nor returned to this Court for its determination.

Defendants nonetheless appealed to the Court of Appeals for the Seventh Circuit. At oral argument the Court of Appeals expressed its concern that this Court's order was not final and appealable because injunctive relief had not been addressed by this Court. Interestingly, plaintiffs argued to the appellate court in supplemental briefing that the district court intended to enter an injunction prohibiting defendants from collecting mandatory student fees unless they provided an opt-out or refund mechanism for students who object to subsidizing the political or ideological views of the student organizations with which they disagree, despite the fact that they specifically requested this Court not to consider appropriate injunctive relief at summary judgment. The Seventh Circuit subsequently found this Court's summary judgment order not to be a final and appealable decision and dismissed defendants' appeal on the ground that it lacked jurisdiction. In its July 11, 1997 order, the Seventh Circuit ordered this Court to address plaintiffs' so-called request for injunctive relief and to unconditionally dismiss the free exercise, Religious Freedom Restoration Act and state law claims.

Accordingly,

ORDER

IT IS ORDERED that:

1. The Board of Regents of the University of Wisconsin System may use mandatory segregated fees only for activities reasonably intended to promote its educational mission by providing opportunities and fora for the free expression of diverse viewpoints, and all political or ideological activities violative of the First Amendment must be supported by voluntary fees, user fees or some other source of revenue.

2. Prior to the beginning of each fiscal year the Board of Regents shall publish written notice of the activities that can be supported by the mandatory segregated fees and the activities that cannot be supported by the mandatory segregated fee. The notice shall set forth each student's pro rata fees to be devoted to activities that cannot be supported by the mandatory segregated fee. The notice shall be sent to all students with their tuition statement. A student may withhold the pro rata portion of the student fees budgeted for activities that cannot be supported by the mandatory segregated fee.

3. A student who contends that the amount of fees which can be withheld was incorrectly determined may deliver to the Board of Regents a written demand for arbitration. Any such demand shall be delivered within 30 days of receipt of the student's tuition statement.

4. If one or more timely demand for arbitration is delivered the Board of Regents shall promptly submit the matter to arbitration before an impartial arbitrator. All such demands for arbitration shall be consolidated for hearing. The costs of the arbitration shall be paid by the Board of Regents.

5. In the event the decision of the arbitrator results in an increased pro rata reduction of dues for students who have delivered timely demands for arbitration for the fiscal year, the Board of Regents shall offer such increased pro rata reduction to students enrolled at the University of Wisconsin System after the date of the arbitrator's decision.

IT IS FURTHER ORDERED that all claims alleged in plaintiffs' complaint other than their First Amendment freedom of speech and association claims are dismissed as moot.

IT IS FURTHER ORDERED that the parties may pursue objections to the proposed injunctive relief at the telephone status conference previously scheduled for August 6, 1997 at 9:15 a.m.

Entered this 23rd day of July, 1997.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued June 4, 1997
July 11, 1997

Before

Hon. William J. Bauer, Circuit *Judge*

Hon. Harlington Wood, Jr., *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

SCOTT H. SOUTHWORTH et al.,

Plaintiffs-Appellees,

Appeal from the United States District Court for the Western District of Wisconsin

No. 97-1001

No. 96 C 0292-S

v.

John C. Shabaz, *Chief Judge.*

MICHAEL W. GREBE et al.,
Defendants-Appellants.

ORDER

Plaintiffs Scott Southworth, Amy Schoepke, and Keith Bannach, each a student at the University of Wisconsin-Madison Law School,[1] sued the members of the

[1] The record indicates that Scott Southworth and Keith Bannach were scheduled to graduate in May 1997, and Amy Schoepke is scheduled to graduate in May 1998.

Board of Regents at the University of Wisconsin System alleging that the Regents' practice of compelling students to pay allocable student fees to fund private ideological and political groups on campus violates their rights of free speech and association, the free exercise clause of the Constitution, and the Religious Freedom Restoration Act. Plaintiffs also alleged pendent state law claims. They sought "declaratory and injunctive relief . . .," specifically:

> Declaratory relief stating that the Regents' policy and practice of giving funds collected through the mandatory student fees to private political and ideological groups is unconstitutional under the United States Constitution, violating the Plaintiffs' rights to freedom of speech, freedom of association, free exercise of religion, and their rights under the Religious Freedom Restoration Act.

They also sought

> injunctive relief against the Regents, ordering them and all of their officers, employees and other agents, to stop funding private groups that engage in ideological or political advocacy; or, in the alternative, to set up a procedure under which students who object to the views expressed by the groups receiving funding may opt out of paying the portion of the mandatory student fee that funds private ideological and political groups.

The parties filed cross-motions for summary judgment. The district court denied the defendants' motion, and granted plaintiffs summary judgment, concluding that the Regents' mandatory allocable segregated fee policy violated plaintiffs' first amendment rights to freedom of

speech and association.[2] But though it ordered declaratory relief, the district court did not address plaintiffs' request for injunctive relief. Rather, it stated that "[b]ecause the parties have agreed to fashion their own remedy in the event a violation of plaintiffs' constitutional rights exists, this Court will not address at this time that which it believes may be that appropriate remedy."

The defendants appealed, asserting jurisdiction was proper under 28 U.S.C § 1291. Section 1291 provides that "courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." 28 U.S.C. § 1291. A decision is final for purposes of § 1291 if the district court's decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (citation omitted).

Because the district court did not address plaintiffs' request for injunctive relief, this court was concerned that the district court's decision was not final and appealable. At oral argument we pursued this issue with the parties, and requested supplemental briefing on this jurisdictional question.

In their supplemental brief, the defendants cite *Kikumura v. Turner*, 28 F.3d 592 (7th Cir. 1994), and *Abbs v. Sullivan*, 963 F.2d 918 (7th Cir. 1992), in support of their view that the district court's opinion is final and appealable. In *Kikumura*, the plaintiff had filed a complaint alleging that

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[2] Because the court concluded that the mandatory allocable segregated fee policy was unconstitutional, it concluded that "it need not address the alleged violations of plaintiffs' First Amendment rights to free exercise of religion and their rights under the Religious Freedom Restoration Act, 42 U S C. § 2000bb." The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, has since been declared unconstitutional. *City of Boerne v. P.F. Flores, Archbishop of San Antonio*, 1997 WL 345322 (1997).

the defendants' prison policy violated his constitutional rights. The plaintiff sought both declaratory and injunctive relief. The district court denied the plaintiff declaratory relief, but never addressed the issue of injunctive relief. The plaintiff appealed and this court held that it had jurisdiction because "the court unequivocally entered a final judgment here, granting the defendant's motion for summary judgment in its entirety." *Id.* at 594.

The defendants claim that this case presents a comparable situation. It does not. In this case, the district court granted the *plaintiffs* summary judgment; in *Kikumura,* the court granted the *defendants* summary judgment. Thus, in *Kikumura,* there was nothing left for the court to do because the plaintiff lost on the constitutional claim. Here, the plaintiffs won on their constitutional claim, meaning the issue of injunctive relief is still pending.

Abbs is also inapposite. In *Abbs,* the plaintiff sought a declaratory judgment that the government's investigative procedures for scientific misconduct were invalid. The plaintiff also requested injunctive relief. The district court denied as moot the request for a preliminary injunction, but granted the plaintiff declaratory relief. Here, on the other hand, the district court did not deny the request for injunctive relief—it never ruled on the issue.

Notwithstanding these factual distinctions, defendants seize on the following language from *Abbs:* "[F]inality was unaffected by the fact that the plaintiffs might later move for injunctive relief if the government refused to accept the declaration." *Id.* at 923. This, defendants argue, supports a conclusion that this case is final.

Defendants read too much into this statement. The above excerpt merely recognizes that a declaratory judgment is a final judgment even if further relief could later be sought:

> [A]ny court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201.

In other words, if a plaintiff requests only declaratory relief and a court rules on that request, the decision is final and appealable. However, if a plaintiff requests both declaratory *and* injunctive relief, and succeeds in obtaining a declaratory judgment, the district court must decide whether to grant or deny injunctive relief. Until it does so, there is something left for the court to do, and therefore, the district court's decision is not final and appealable. *Peterson v. Lindner*, 765 F.2d 698, 703 (7th Cir. 1985) (concluding that a district court order was not final and appealable even though the court's order was a declaratory judgment because "it nonetheless left unresolved respondent's requests for injunction, for compensatory and exemplary damages, and for attorneys' fees.") (internal citation omitted).[3]

Plaintiffs present a more compelling argument for finality. They contend that the district court in effect ruled on the request for injunctive relief in the declaratory judgment. The plaintiffs point to the district court's statement that "the university must provide some sort of opt-out provision or refund system for those students who object to subsidizing political and ideological student organizations with which they disagree."

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[3] The defendants present other arguments for jurisdiction, most of which question the plaintiffs' right to injunctive relief—a question which is irrelevant for purposes of the jurisdictional issue because the district court never ruled on the request for injunctive relief.

So far we have assumed that the district court did not rule on the request for injunctive relief. But the above excerpt makes us unsure of the court's intent: Did the district court intend to grant injunctive relief as well? It seems not, given that in the very next sentence, the district court stated: "Because the parties have agreed to fashion their own remedy in the event a violation of plaintiffs' constitutional rights exists, this Court will not address at this time that which it believes may be that appropriate remedy."[4] Additionally, in its order, the district court did not mention injunctive relief, instead stating only "that judgment be entered declaring that the mandatory segregated fee policy violates the First Amendment to the United States Constitution." Moreover, in their motion for summary judgment, the plaintiffs informed the district court that it need not rule on their request for injunctive relief:

> This Court needs only to address the question of constitutional liability whether the current mandatory fee system violates the Constitution. Plaintiffs believe that if this Court finds a constitutional violation, the parties can work out an acceptable *remedy* among themselves. If they can't reach agreement on a remedy, then the parties can return to this Court for its judgment on a proper remedy.

Given that the plaintiffs only sought summary judgment on the request for declaratory relief and that it is unclear whether the district court intended to enter an injunction, we cannot conclude that the district court ruled on the plaintiffs' request for injunctive relief. *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 320 (7th Cir. 1995) (if it is unclear whether an injunction has been issued, or what conduct might be enjoined, there is no injunction). As *Reich* makes clear, Fed. R. Civ. P. 65(d) requires that an injunction

[4] On appeal, the defendants stated: "The parties did not enter into any such agreement." [Appellants' Supp. Br. at 7.]

be specific in terms and describe in reasonable detail the acts to be restrained, and if the district court's order is "unclear whether an injunction exists or what it enjoins," it has no binding force and cannot be appealed. *Id.*

The plaintiffs contend the district court intended to enter an injunction prohibiting the defendants from collecting mandatory student fees unless they provided an opt-out or refund mechanism for students who object to subsidizing the political or ideological views of student organizations with which they disagree. If so, the court should say so clearly under the procedures set forth in Fed.R.Civ.P. 58 and 65(d). Until the district court clarifies its intent and addresses the request for injunctive relief, the district court's judgment is not final and appealable.

There is yet another jurisdictional problem: In granting plaintiffs summary judgment, the district court did not rule on the plaintiffs' free exercise claim or claim based on RFRA. Additionally, the plaintiffs' reply brief in support of summary judgment asserts that the "plaintiffs withdr[e]w their pendent state law claims," yet it does not appear that the district court entered an order formally dismissing these claims. While a summary judgment ruling that fully disposes of all claims, among all parties, is final, 15B Wright, Cooper & Miller, *Federal Practice and Procedure: Jurisdiction* 2d § 3914.28 (1992), a summary disposition of less than all claims is not final (absent some other applicable jurisdictional provision). *Id.* Thus, on remand, the district court must unconditionally dispose of all remaining counts. *See Horowitz v. Alloy Automotive Co.*, 957 F.2d 143 1, 1335-36 (7th Cir. 1992) (district court cannot create a final and appealable order by dismissing good counts with leave to reinstate); *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1077 (9th Cir. 1994) (stipulation to dismiss remaining claims without prejudice did not convert partial summary judgment into a final and appealable order).

Once these jurisdictional defects are cured—by (1) ruling on the request for an injunction, and (2) disposing of all remaining claims—the case will be final and appealable, and an appeal taken upon the filing of a notice of appeal.[5] Given that the appeal will be successive, Operating Procedures, No. 6, *reprinted in* Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit at 214, and that extensive briefing and argument on the merits has already occurred, any briefing should be limited to the district court's decision concerning injunctive relief and the remaining counts. The court will then "notify the circuit executive whether oral argument is necessary." *Id.*

DISMISSED for lack of jurisdiction.

[5] We assume the case has not become moot. As noted above, two plaintiffs were scheduled to graduate in May 1997, but the remaining plaintiff is not scheduled to graduate until May 1998. It is not clear what claims for non-monetary remedies remain for the plaintiffs who graduated. To prevent any further waste of judicial resources, any substitution of parties or class certification should take place before any successive appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTT HAROLD SOUTHWORTH, AMY SCHOEPKE AND KEITH BANNACH,

Plaintiff(s),

AMENDED JUDGMENT IN A CIVIL CASE

v.

Case No. 96-C-292-S

MICHAEL W. GREBE, SHELDON B. LUBAR, JONATHAN B. BARRY, JOHN T. BENSON, BRIGIT E. BROWN, JOHN BUDZINSKI, ALFRED S. DE SIMONE, LEE S. DREYFUS, DANIEL C. GELATT, KATHLEEN J. HEMPEL, RUTH MARCENE JAMES, PHYLLIS M. KRUTSCH, VIRGINIA R. MACNEIL, SAN W. ORR, JR., GERARD A. RANDALL, JR., JAY L. SMITH AND GEORGE K. STEIL, SR.,

Defendant(s).

THIS ACTION CAME FOR CONSIDERATION BEFORE THE COURT WITH DISTRICT JUDGE JOHN C. SHABAZ PRESIDING. THE ISSUES HAVE BEEN CONSIDERED AND A DECISION HAS BEEN RENDERED.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS ENTERED DECLARING THAT DEFENDANTS' USE OF THE MANDATORY SEGREGATED FEE TO SUPPORT POLITICAL AND IDEOLOGICAL ACTIVITIES VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, WITH COSTS TO PLAINTIFFS.

Approved as to form this 2nd day of December, 1996.

/s/ John C. Shabaz
JOHN C. SHABAZ
DISTRICT JUDGE

/s/ Joseph W. Skupniewitz
Joseph W. Skupniewitz, Clerk

by Deputy Clerk

Date

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SCOTT HAROLD SOUTHWORTH, AMY SCHOEPKE AND KEITH BANNACH,

Plaintiff(s),

JUDGMENT IN A CIVIL CASE

v. Case No. 96-C-292-S

MICHAEL W. GREBE, SHELDON B. LUBAR, JONATHAN B. BARRY, JOHN T. BENSON, BRIGIT E. BROWN, JOHN BUDZINSKI, ALFRED S. DE SIMONE, LEE S. DREYFUS, DANIEL C. GELATT, KATHLEEN J. HEMPEL, RUTH MARCENE JAMES, PHYLLIS M. KRUTSCH, VIRGINIA R. MACNEIL, SAN W. ORR, JR., GERARD A. RANDALL, JR., JAY L. SMITH AND GEORGE K. STEIL, SR.,

Defendant(s).

THIS ACTION CAME FOR CONSIDERATION BEFORE THE COURT WITH DISTRICT JUDGE JOHN C. SHABAZ PRESIDING. THE ISSUES HAVE BEEN CONSIDERED AND A DECISION HAS BEEN RENDERED.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS ENTERED DECLARING THAT THE MANDATORY SEGREGATED FEE POLICY VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

Approved as to form this 29th day of November, 1996.

/s/ John C. Shabaz
JOHN C. SHABAZ
DISTRICT JUDGE

/s/ Joseph W. Skupniewitz
Joseph W. Skupniewitz, Clerk

by Deputy Clerk _____ Date _____

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTT HAROLD SOUTHWORTH, AMY SCHOEPKE and KEITH BANNACH,

Plaintiffs, MEMORANDUM AND ORDER

v. Case No. 96-C-0292-S

MICHAEL W. GREBE; SHELDON B. LUBAR; JONATHON B. BARRY; JOHN T. BENSON; BRIGIT E. BROWN; JOHN BUDZINSKI; ALFRED S. DE SIMONE; LEE S. DREYFUS; DANIEL C. GELATT; KATHLEEN J. HEMPEL; RUTH MARCENE JAMES; PHYLLIS ML KURTSCH; VIRGINIA R. MACNEIL; SAN W. ORR, JR.; GERARD A. RANDALL, JR.; JAY L. SMITH and GEORGE K. STEIL, SR., all in their Official capacities as members of the Board of Regents of the University of Wisconsin System,

Defendants.

Plaintiffs commenced the above entitled action against defendants for declaratory and injunctive relief for the alleged violations of plaintiffs' rights to freedom of speech, freedom of association, free exercise religion, and their rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. Plaintiffs seek a declaration that defendants' imposition of mandatory student fees upon students enrolled as students at the University of Wisconsin is unconstitutional because it compels students to fund

private ideological and political groups on the Madison campus. Jurisdiction exists pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §1343.

The action is currently before this Court on the parties' cross motions for summary judgment.

FACTS

Plaintiffs Scott Harold Southworth, Amy Schoepke and Keith Bannach are three law students currently enrolled at the University of Wisconsin Law School. Plaintiffs Southworth and Bannach are in their third year of law school while plaintiff Schoepke is a second year law student. Defendants are members of the Board of Regents of the University of Wisconsin System being sued in their official capacity. The Board of Regents governs the University of Wisconsin educational system pursuant to authority granted in § 36.09(1), WIS. STATS.

Every student at the University of Wisconsin at Madison ("UW Madison") is required to pay a mandatory, nonrefundable fee each semester. This fee, called the segregated university fee or the segregated fee, is deposited in the state treasury upon receipt by the university. Students refusing to pay the aggregated fee may not graduate or receive their grades from UW-Madison.

Section 36.09, WIS. STATS., gives both the Board of Regents and the students control over the funds generated by the segregated fee. The students' interests are represented on campus at UW-Madison by the student government organization Associated Students of Madison ("ASM"). The Student Services Finance Committee ("SSFC") exists as part of ASM to review both the internal ASM budget and the external university budgets that are funded by the segregated fee.

The segregated fee is divided into two main categories: nonallocable fees and allocable fees. The nonallocable fees are used to fund items such as debt service, fixed operating costs of auxiliary operations, required reserves, the Wisconsin Unions, the first and second year of the recreational sports budget and University Health Services. The SSFC is permitted to comment on how the nonallocable funds are distributed. However, the chancellor has ultimate authority over these funds, and the students' input concerning the distribution of the nonallocable funds is not binding upon the chancellor's decisions.

Section 36.09, WIS. STATS., provides:

> (5) **Students.** The students of each institution or campus subject to the responsibilities and powers of the board, the president, the chancellor and the faculty shall be active participants in the governance of and policy development for such institutions. As such, students shall have primary responsibility for the formulation and review of policies concerning student life, services and interests. *Students in consultation with the chancellor and subject to the final confirmation of the board [of regents] shall have the responsibility for the disposition of those student fees, which constitute substantial support for campus student activities.* The students of each institution or campus shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance.

(emphasis added). The Board of Regents has determined that student responsibility for the direct disposition of student fees exists only for the allocable portion of the segregated

fee. At UW-Madison, the allocable category of the segregated fee funds the General Student Service Fund ("GSSF"), the Child Care Tuition Assistance Program, the Wisconsin Union Directorate Distinguished. Lectures Series, the third year of the recreational sports budget, the ASM budget, Wisconsin Public Interest Research Group ("WISPIRG") and the United Council.

As previously stated, ASM, in conjunction with SSFC, act on behalf of the students at UW-Madison with respect to the distribution of the allocable portion of the segregated fee. All students at UW-Madison are eligible to participate in the process of reviewing and approving the allocations by running for election to ASM or SSFC. Students are also permitted to attend ASM and SSFC meetings where allocation determinations are made. The process for reviewing and approving allocations for funding is administered by ASM and SSFC in a viewpoint-neutral fashion.

Grants from the UW-Madison student government are available primarily to registered student organizations. To be eligible to register as a registered student organization, a student group must be a not-for-profit, formalized group; composed mainly of students; controlled and directed by students; related to student life on campus; abide by all federal, state, city and university nondiscrimination laws and policies; identify a student as a primary contract person for the organization, provide the Student Organization Office with the information required on the registration form; and abide by the financial and other regulations specified in the Student Organization Handbook.

Registered student organizations can seek funding from the segregated fee in one of three ways. First, a student organization can apply to the SSFC for GSSF funding. Applications for GSSF funding are open to all registered student organizations, in addition to university departments

and community based services. GSSF funding provides a source of funds for those services, which provide direct, ongoing services to significant numbers of UW-Madison students. Second, registered student organizations can seek funding from ASM's Student Activity Fund. These funds also come from the segregated fee and are divided into three different types of grants: operations grants, event grants and travel grants. Finally, registered student organizations can seek funding through a student referendum, whereby the UW-Madison student body approves a specific assessment for a registered student organization by vote during a campus election.

Once ASM and SSFC have approved the disbursements of the allocable portion of the segregated fee, their decisions are sent to the chancellor and the Board of Regents for their review and approval. The Board of Regents has final authority to approve or disapprove the allocations of funds by ASM and SSFC. Student organizations receiving funding from the segregated fee do not get cash or a lump sum payment from the ASM. The organizations must submit a requisition or other appropriate business form requesting payment. An employee of the Office of Dean of Students working with ASM orders the disbursement of the money. Except for membership fees paid in lump sum to WISPIRG, United Council and other multi-campus membership organizations, no money actually goes to the student organizations to pay their bills. Employees of the organizations receiving allocations from the segregated fee receive their salaries or stipends from the university payroll system.

Full-time students attending UW-Madison during the 1995-96 school year were required to pay the segregated fee of $165.75 each semester, for a total of $331.50. The segregated fee for each semester during the 1995-96 school year was distributed as follows:

$ 79.34	University Health Service
$ 46.51	Memorial Union and Union South
$ 13.42	General Student Services Fund (GSSF)
$ 8.20	System Audit reliability Fee
$ 7.78	Intramural and recreational sports
$ 4.76	Child Care Tuition Assistance Program
$ 4.28	Associated Students of Madison (ASM)
$ .75	United Council
$ .71	Wisconsin Public Interest Research Group (WISPIRG)
$165.75	

During the first semester of the 1996-97 school year, full-time students at UW-Madison paid a segregated fee of $190.45 for the first semester, which was distributed as follows:

$ 85.39	University Health Service
$ 48.64	Memorial Union and Union South
$ 20.08	Bus Pass privileges on Madison Metro Transit System
$ 6.48	General Student Services Fund (GSSF)
$ 8.12	System Audit Liability Fee
$ 10.89	Intramural and recreational sports
$ 4.56	Child Care Tuition Assistance Program
$ 4.63	Associated Students of Madison (ASM)
$ .95	United Council
$ .71	Wisconsin Public Interest Research Group (WISPIRG)
$190.45	

With funds generated from the allocable portion of the segregated fee, ASM and SSFC subsidize approximately 140 of the 623 total registered student organizations. Most of these organizations are devoted to academic, cultural or recreational pursuits. The Food Science Club, American Society of Landscape Architects, and the Recreation

Education Club are random, typical examples of registered student organizations receiving distributions.

However, other registered student organizations which obtain funding from the segregated fee are organized, at least in part, to pursue political or ideological goals. Plaintiffs specifically object to the following eighteen student organizations that are funded by ASM or SSFC with proceeds from the allocable portion of the segregated fee: WISPIRG; the Lesbian, Gay, Bisexual Campus Center; the Campus Women's Center; the UW Greens; the Madison AIDS Support Network; the International Socialist Organization; the Ten Percent Society; the Progressive Student Network; Amnesty International; United States Student Association; Community Action on Latin America; La Colectiva Cultural de Aztlan; the Militant Student Union of the University of Wisconsin; the Student Labor Action Coalition; Student Solidarity; Student NOW (Students of National Organization for Women); MADPAC; and Madison Treaty Rights Support Group.

Plaintiffs contend that ASM and SSFC's use of the mandatory segregated fee to subsidize student organizations such as the eighteen aforementioned groups which plaintiffs allege pursue political or ideological goals violates their First Amendment[1] rights to freedom of speech, freedom of association, free exercise of religion, and their rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. Both parties have moved for summary judgment on the constitutionality of the use of the segregated fee to fund political or ideological activity by registered student organizations.

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[1] Technically, of course, the Fourteenth Amendment is relevant for the limited purpose of incorporating the First Amendment. *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 404 (7th Cir. 1996) (citing *McIntyre v. Ohio Elections Com'n*, 115 S. Ct. 1511, 1514 n.1 (1995)).

MEMORANDUM

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). A fact is material only if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine only if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. *Id.*

In this case, the parties agree that no genuine issue of material fact exists. Accordingly, this Court is left to determine which of the moving parties is entitled to judgment as a matter of law.

Freedoms of Speech and Association

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Just as the First Amendment prohibits abridgements of the rights to speak and associate, the United States Supreme Court has recognized that among the First Amendment protections are the rights not to speak and not to associate. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Because the imposition of mandatory fees

implicates both freedom of speech and freedom of association, the Court must consider plaintiffs' claims using a strict scrutiny analysis. Strict scrutiny provides that a state may infringe upon one's First Amendment right to freedom of speech or freedom of association if it serves a compelling state interest, unrelated to the suppression of ideas, and cannot be achieved through less restrictive means. *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 303 n.11 (1986).

In this case plaintiffs contend that the use of the mandatory segregated fees to subsidize student organizations that are engaged in political and ideological activities violates their First Amendment rights not to be compelled to speak and associate. Defendants argue that the mandatory segregation fee does not compel speech on behalf of plaintiffs, but rather funds fora for the expression of different views at the University of Wisconsin. To the extent that the segregated fee infringes plaintiffs' first amendment rights, defendants claim that such infringement is justified by the university's compelling interest in providing opportunities for free and wide-ranging discussion of competing viewpoints. Accordingly, the parties' arguments in this case requires the Court to strike a balance between two very significant competing interests: the plaintiffs' constitutional right not to be compelled to financially subsidize political or ideological activities balanced against the Board of Regents' authority to promote the university's educational mission by providing opportunities for the free expression of diverse viewpoints on difficult and challenging issues.

The United States Supreme Court was presented with similar competing interests in two early mandatory fee cases. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), teachers in the Detroit school system challenged the constitutionality of an agency-shop agreement whereby teachers who declined to join the teachers' union would be subject to termination unless they paid a services fee to the

union for benefits received on their part as a result of the union's collective bargaining efforts. The *Abood* Court held that the board of education could compel the non-union teachers to pay a services fee to the teachers' union even though they chose not to join the union. *Id.* at 222-23. However, the Supreme Court found that the union was restricted in the manner it used the non-union employees' service fees. The Court held that the constitutional prohibition against compelled speech and association prohibited a union from using a non-union employee's service fees to fund the expression of political and ideological views that were not germane to the union's purpose of collective bargaining. *Id.* at 234.

The First Amendment principles that underlie the decision in *Abood* were revisited by the United States Supreme Court in *Keller v. State Bar of California*, 496 U.S. 1 (1990). *Keller* was concerned with the mandatory payment of dues by lawyers to a state bar association. The plaintiff attorneys in *Keller* objected to the state bar's use of their mandatory dues to fund lobbying on social issues that had little to do with the practice of law, such as nuclear weapons, abortions, prayer in public schools and busing. *Id.* at 15. The state bar defended its position arguing that it was authorized to fund activities "in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." *Id.* (citation omitted). Affirming *Abood*'s holding that the use of mandatory fees must be germane to the purpose of the funded organization, the Supreme Court elaborated in *Keller*:

> *Abood* held that unions could not expend a dissenting individual's dues for ideological activities not germane to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal

> profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Id. at 13-14. To summarize, *Keller* and *Abood* teach that the state may compel a person to support an organization if there is a sufficiently compelling reason to do so, and that the organization's use of mandatory contributions must be germane to the purposes that justified the requirement of support." *Smith v. Regents of the University of California*, 844 P.2d 500, 508 (Cal. 1993).

Defendants argue that the mandatory fee doctrine established by the United States Supreme Court in *Abood* and *Keller* is not applicable for two reasons. Defendants first contend that the mandatory fee doctrine is inapplicable to this case because the student organizations that are being subsidized by the segregated fee do not purport to speak for all students, unlike the union in *Abood* and the state bar association in *Keller*. This argument is without merit. An individual's rights to freedom of speech and freedom of association are protected by the First Amendment regardless of whether or not the infringement of said rights is perceived by others. Thus, the fact that the student organizations do not purport to speak on behalf of all students is irrelevant to the determination of whether or not plaintiffs' First Amendment rights have been infringed. If, as in this case, an individual is compelled to subsidize political or ideological activity with which he or she disagrees, First Amendment protections apply because the individual is being forced to support something with which he or she disagrees. Whether or not a third person attributes a student organization's political or ideological position to an individual student does not eradicate the fact that the individual student knows that he or

she is financially supporting an organization that is engaging in activity which he or she finds repugnant. These concerns are identical to those that the Supreme Court considered when it developed the mandatory fee doctrine in the *Abood* and *Keller* decisions.

Defendants also contend that *Abood* and *Keller* are inapplicable to this case because unions and bar associations do not offer the opportunity for dissenting members to work in the democratic process, unlike ASM and SSFC, the student government organizations in this case. This is a distinction without a difference. It is true that the dissenting teachers in *Abood* were not members of the union and therefore did not have a role in the democratic process for electing representatives for the union leadership. However, the dissenting attorneys in *Keller* were required to be members of the state bar association and therefore were provided an opportunity to work within a democratic system to elect their own representatives. The *Keller* Court did not find this distinction relevant when it affirmed its holding in *Abood*. Because the Supreme Court did not find this distinction to be relevant in *Keller*, it follows that the same distinction is also irrelevant in this Court's application of the mandatory fee doctrine.

Further support for the fact that *Abood* and *Keller* are applicable to the issues presently before this Court exists in Justice O'Connor's concurrence in the United States Supreme Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S.Ct. 2510 (1995). Justice O'Connor stated that "although the question is not presented here, I note the possibility that the [mandatory] student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees." *Id.* at 2527. In support of this statement, Justice O'Connor cited both *Abood* and *Keller*, obviously believing that these cases were pivotal in determining the constitutionality of mandatory student fees

being used to subsidize political and ideological student organizations. *Id.* Accordingly, the mandatory fee doctrine as addressed by the United States Supreme Court in *Abood* and *Keller* is applicable to facts involving a university requiring students to pay mandatory student activity fees.

The First Amendment implications of the mandatory fee doctrine were considered in the context of mandatory student fees funding political and ideological student organizations by the California Supreme Court in *Smith v. Regents of the University of California*, 844 P.2d 500 (Cal. 1993). In *Smith*, a number of students at the University of California at Berkeley ("UC-Berkeley") challenged a mandatory activity fee they were required to pay each semester. A portion of the funds generated by this fee was transferred to a student association which financed the UC-Berkeley student government as well as other student activity groups. The plaintiffs objected to funds from their mandatory student fees being used to subsidize sixteen student organizations in addition to the student government because they engaged in political or ideological activity. The plaintiffs claimed that compelling them to provide contributions to these organizations violated their rights to freedom of speech and freedom of association as guaranteed by both the California and United States Constitutions.

The *Smith* court began its analysis by reviewing the United States Supreme Court's mandatory fee decisions in *Abood* and *Keller*. The court then discussed the educational function of a state 1060 (3d Cir. 1985). students challenged the university's policy of funding the New Jersey Public Interest Group ("NJPIRG") with mandatory student fees[2]. The Third Circuit Court Appeals recognized the NJPIRG offered some educational benefits to students, however the court found that such benefits were incidental to the

[2] NJPIRG is the New Jersey counterpart to NYPIRG in the *Carroll* case.

organization's primarily political and ideological purpose. *Id.* at 1065-67. Accordingly, the *Galda* court found that the incidental educational benefits NJPIRG offered were insufficient to justify the infringement of the dissenting students' speech and associational rights. *Id.*

The California Supreme Court determined that the cumulative holdings in *Carroll* and *Galda*, in addition to *Abood* and *Keller*, stood for three principles. First, a state university may support student organizations through mandatory student fees because the use of funds can be germane to the university's educational mission. *Smith*, 500 P.2d at 511. Second, at some point, the educational benefits that the funded student groups offer become incidental to the groups's primary function of advancing its own political and ideological interests. *Id.* Third, while the funding of those student groups may still provide some educational benefits to students attending the university, the incidental benefit to the students' education will not justify the burden on the dissenting students' constitutional rights. *Id.* To reiterate using strict scrutiny vernacular, a state university has a compelling governmental interest in promoting the free expression of ideas on campus by funding student organizations that offer educational benefits. However, at the point where the educational benefits offered by a student organization become incidental to the organization's political and ideological purposes, the funding of said organization is no longer germane to the university's function and therefore is not narrowly drawn or carefully tailored to avoid the unnecessary infringement of dissenting students' constitutional rights.

Defendants acknowledge the existence of the California Supreme Court's decision in *Smith*. However, defendants contend that the *Smith* decision is not persuasive in this case because it is the law only in California and has been widely criticized. While it is true that the *Smith* decision is the law only in California and therefore not

binding on this Court, it is the only decision that has considered a First Amendment challenge to mandatory student fees being used to fund student organizations engaged in political and ideological activities.[3] In support of their argument that the *Smith* decision has been "widely criticized," defendants cite two student written law review articles.[4] However, two critical law review articles written over the course of nearly four years since the *Smith* decision was announced are hardly sufficient to warrant the "widely criticized" label so quickly applied by defendants.

This Court finds the *Smith* decision to be persuasive in this case because the California Supreme Court carefully weighed the same two competing interests in *Smith* as are presently pending before this Court. The *Smith* court ultimately found that the dissenting students' First Amendment rights prevailed over UC-Berkeley's interest in promoting the fee expression of ideas. The *Smith* holding coincides with the purposes our founding fathers act upon when they created the Bill of Rights: to protect the individual from compelled speech or association by the government. As Thomas Jefferson once said, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood*, 431 U.S. at 234-34 n.31 (quoting Brant, James Madison: The Nationalist 354 (1948)) Because the *Smith* court recognized the importance of protecting the

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[3] While the courts in *Carroll* and *Galda* considered First Amendment challenges to mandatory student fees being used to fund specific political organizations, *Smith* is the only case where students challenged the entire mandatory student fee system funding all political and ideological student organizations on First Amendment grounds. *See* 957 F.2d at 993-94; 772 F.2d at 1064.

[4] *See* Robert L. Waring, Comment, *Talk Is Not Cheap: Funded Student Speech at Public Universities on Trial*, 29 U.S.F. L. Rev. 541 (1995); Carolyn Wiggin, Note, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities*, 103 Yale L.J. 2009 (1994).

individual's First Amendment rights to contrast to the power of the government, its analysis is persuasive to this Court in its resolution of the instant case.

Accordingly, just as the *Smith* court found that the students at UC-Berkeley were forced to support groups whose primary function was to promote political and ideological activities, plaintiffs are being compelled to subsidize student organization at UW-Madison whose educational benefits to the UW-Madison campus are incidental to some student organizations' political and ideological activities. This Court need not determine if each and every of the eighteen groups that plaintiffs specifically challenge offer educational benefits that justify the infringement of plaintiffs' speech and associational rights. As long as more than a de minimis number of student organizations are using their funding from the segregated fee to engage in primarily political and ideological activity, defendants infringement of plaintiffs' First Amendment rights cannot be legally justified.

While many of the eighteen student organizations challenged by plaintiffs provide more than incidental educational benefits to the UW-Madison campus, some of them do not. The UW Greens, the International Socialist Organization, the Lesbian, Gay, Bisexual Campus Center and the Ten Percent Society are examples of student organizations registered at UW-Madison that engage primarily in political or ideological activity. The UW Greens is a student organization whose primary purpose is to advance environmentally related causes. Among other activities, the UW Greens sought introduction of bills in the Wisconsin Assembly, distributed literature supporting the Green Party USA and Ralph Nadar for President, and was one of the demonstrated their opposition to Governor Thompson's budget by composting it. The International Socialist Organization's primary purpose is to promote socialism on the UW Madison campus. While this student

organization has provided some educational benefits to the UW Madison campus, such as cosponsoring debates, these benefits are incidental to its purpose of advocating a political and ideological agenda. The International Socialist Organization is really no different that the College Republicans or College Democrats, all of whom are primarily concerned with promoting political and ideological positions. Similarly, the Lesbian, Gay, Bisexual Campus Center is a student organization that is primarily concerned with advancing the homosexual agenda and promoting pro-homosexual political activism. While it does offer some educational services to UW Madison students, these services are incidental to the center's primary purpose of promoting political and ideological goals. Finally, the Ten Percent Society describes itself as a pro-homosexual group that educates members of the UW Madison campus on issues that affect the homosexual community as well as being politically active concerning homosexual issues such as same sex marriages and domestic partner insurance. While there is some educational component to the Ten Percent Society, it clearly is secondary to the group's primary purpose of promoting its political and ideological agendas.

These four student organizations are examples of the types of student organizations at UW-Madison that are engaging in primarily political or ideological activity while being subsidized by the mandatory segregated fee. Even though the existence of these student organizations on the UW-Madison campus contributes to one of the university's functions of promoting the free exchange of perhaps controversial ideas, the primarily political or ideological nature of these student organizations results in the likelihood of some of these groups' positions being repugnant to students who hold a differing political or ideological position. Compelling students who are strongly opposed to the positions that these student organizations advocate to subsidize these organizations which offer no more than limited, incidental educational benefits to the UW-Madison

campus is not narrowly tailored to prevent the infringement of the dissenting students' First Amendment rights. The university's compelling interest in promoting the free exchange of ideas by subsidizing the political and ideological student organizations does not justify such infringement because the university has not carefully tailored the implementation of its interests so as to avoid the unnecessary infringement of the First Amendment rights of those students who disagree with the political and ideological messages being advocated by certain student organizations. This is not to say that these political and ideological student organizations cannot be funded by the segregated fees of those students who do not object. These political and ideological student organizations contribute in a limited manner to the educational function of state universities and can be funded by mandatory student fees such as the segregated fee, however, the university must provide some sort of opt-out provision or refund system for those student organizations with which they disagree. Because the parties have agreed to fashion their own remedy in the event a violation of plaintiffs' constitutional rights exists, this Court will not address at this time that which it believes may be that appropriate remedy.

Defendants' primary argument in support of the constitutionality of the segregated fee system is that the university is not compelling students to speak and associate with political and ideological student organizations, but rather the segregated fee is being used to create a forum for the expression of diverse views. They claim that the segregated fee provides student organizations with the means to present educational opportunities consistent with each organization's purpose, philosophy and goal. Defendants further contend that because the segregated fee creates a forum for the expression of diverse views and which are being distributed in a viewpoint-neutral manner, the mandatory segregated fee does not violate plaintiffs' First Amendment rights. "As the 'speakers corner' of Hyde Park

in London provides a platform for the espousing of social, religious and political ideas by various and divergent individuals, so the student association funds provide the monetary platform for various and divergent student organizations to inject a spectrum of ideas into the campus community." *Lace v. University of Vermont*, 303 A.2d 475, 479 (Vt. 1973)

The United States Supreme Court has found that in some sense student activities fees constitute a forum for speech or association. *Rosenberger*, 115 S.Ct. at 2517. Other courts have found that a university's use of mandatory student activity fees to fund a student newspaper did not violate the dissenting students' First Amendment rights because they provided a public forum for the students to speak and associate. *See Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992); *Kania v. Fordham*, 702 F.2d 475, 479 (4th Cir. 1983); *Arrington v. Taylor*, 380 F. Supp. 1348 (M.D.N.C. 1974); *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb. 1973). These cases are distinguishable from this case, however, because they all involved challenges to campus newspapers that were being funded at least in part by student activity fees. Clearly, a newspaper is a forum whereby students may express diverse viewpoints.

In this case, there are clearly many instances where portions of the segregated fee are being used to create a forum for student organizations to express their views. However, there are a number of situations to express their views. However, there are a number of situations where portions of the segregated fee are being used clearly to fund political and ideological activity, not to provide a forum for the free exchange of ideas. For example, both the UW Greens and the Progressive Student Network sought the introduction of two environmental bills in the Wisconsin Assembly. WISPIRG and the UW Greens lead a march to the State Capitol to compost Governor Thompson's budget in order to demonstrate their opposition to it. WISPIRG uses

student interns to lobby state legislators concerning numerous environmental issues. The International Socialist Organization organized pro-labor rallies at the State Capitol and in Congressman Scott Klug's office, in addition to participating in a demonstration around a predominantly black church in protest of speakers opposing homosexuality. These activities engaged in by student organizations funded by a portion of the segregated fee can hardly be said to be creating fora for the exchange of ideas on the UW-Madison campus. In fact, most of these activities did not even occur on the UW-Madison campus. Furthermore, it would be distorting the facts to say that these activities, which are purely political and ideological in their nature, are offering students services or creating a forum for the exchange of ideas.

In an effort to save their forum argument, defendants argue that the segregated fees were not used to fund any political or ideological activities. Therefore, defendants contend that they are entitled to summary judgment because plaintiffs have not demonstrated that portions of the segregated fee directly funded the political or ideological activities to which plaintiffs object. This argument is without merit because whether or not proceeds from the segregated fees actually funded the political or ideological activities is irrelevant. By subsidizing overhead expenses of a political or ideological organization the university subsidizes the entire effort of the particular student group. When faced with a similar argument in the collective bargaining context in *Abood*, the United States Supreme Court reasoned:

> It is plainly not an adequate remedy to limit the use of the actual dollars collected from dissenting employees to collective-bargaining purposes:
> "[Such a limitation] is of bookkeeping significance only rather than a matter of real substance. It must be remembered that the service fee is admittedly the exact equal of membership initiation fees and monthly dues . . . and that . . . dues collected from members may be used for a 'variety of purposes, in addition to meeting the union's costs of collective bargaining.' Unions 'rather typically' use their membership dues 'to do those things which the members authorize the union to do in their interest and on their behalf.' If the union's total budget is divided between collective bargaining and institutional expenses and if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmember will pay more of these expenses than his pro rata share. The member will pay less and to that extent a portion of his fees and dues is available to pay institutional expenses. The union's budget is balanced. By paying a larger share of collective bargaining costs the nonmember subsidizes the union's institutional activities." *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753-54.

Abood, 431 U.S. at 237 n.35. Accordingly, it is irrelevant whether the political or ideological activities of student organizations are directly funded with proceeds from the segregated fees. If the student organizations are subsidized at least in part with portions of the mandatory segregated fee, plaintiffs' First Amendment rights are implicated because they are being compelled to support political and ideological activity with which they disagree.

Conclusion

For the aforementioned reasons, this Court finds that the balance between the competing interests in this case tips in favor of plaintiffs' First Amendment rights not to be compelled to speak or associate. Plaintiffs have established

that proceeds from the mandatory segregated fees are being used to subsidize student organizations whose primary purpose is to advance political or ideological causes. Because it has been determined that the educational benefits of some of these student organizations are only limited and incidental to their primary political or ideological purposes, the funding of these student organizations is not germane to the university's function and accordingly not narrowly tailored to avoid the unnecessary infringement of plaintiffs' First Amendment rights.

Because this court finds that the mandatory segregated fees violate plaintiffs' First Amendment rights to freedom of speech and association, it need not address the alleged violations of plaintiffs' First Amendment rights to free exercise of religion and their rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb.

ORDER

IT IS ORDERED that plaintiffs' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that judgment be entered declaring that the mandatory segregated fee policy violates the First Amendment to the United States Constitution.

Entered this 29th day of November, 1996

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SCOTT HAROLD SOUTHWORTH, AMY SCHOEPKE and KEITH BANNACH,

Plaintiffs,

v. Case No. 96-C-0292-S

MICHAEL W. GREBE; SHELDON B. LUBAR; JONATHAN B. BARRY; JOHN T. BENSON; BRIGIT E. BROWN; JOHN BUDZINSKI; ALFRED S. DE SIMONE; LEE S. DREYFUS; DANIEL C. GELATT; KATHLEEN J. HEMPEL; RUTH MARCENE JAMES; PHYLLIS M. KRUTSCH; VIRGINIA R. MACNEIL; SAN W. ORR, JR.; GERARD A. RANDALL, JR.; JAY L. SMITH and GEORGE K. STEIL, SR., all in their official capacities as members of the Board of Regents of the University of Wisconsin System,

Defendants.

STIPULATION OF FACTS

Plaintiffs and defendants by their undersigned counsel stipulate for purposes of dispositive motions in this action, the Court may accept the following facts as established:

1. Students enrolled fulltime at the University of Wisconsin-Madison must pay a mandatory fee each semester. This fee is called the segregated university fee or the

segregated fee. The segregated fee money collected from the students is deposited in state accounts.

2. Section 36.09, Wis. Stats., gives both the Board of Regents and the students control over the funds generated by the segregated fee. This is sometimes called "shared governance." Section 36.09(5), Wis. Stats., states:

> STUDENTS. The students of each institution or campus subject to the responsibilities and powers of the board, the president, the chancellor and the faculty shall be active participants in the immediate governance of and policy development for such institutions. As such, students shall have primary responsibility for the formulation and review of policies concerning student life, services and interests. Students in consultation with the chancellor and subject to the final confirmation of the board shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities. The students of each institution or campus shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance.

3. The Associated Students of Madison (ASM) exists as the student association entitled to represent students on campus. The Student Services Finance Committee (SSFC) exists as part of the ASM (student government) to review internal ASM budgets and external university budgets that are funded by the segregated fee.

4. The Board of Regents has divided the expenditures of the segregated fee into two main categories, with several subdivisions under each of the two categories.

The two main subdivisions are *allocable* fees and *nonallocable* fees.

5. Full-time students attending the University of Wisconsin-Madison during the first semester 1995-96 school year were required to pay the segregated fee of $165.75 for the first semester. During the second semester, full-time students paid again the segregated fee of $165.75, for a total of $331.50 ($330.00 in segregated fees, and $1.50 to the United Council). The University distributed each student's segregated each semester during the 95-96 school year as follows:

Health (nonallocable): $79.34 -- The University Health Service portion of the segregated fee supports the clinical medicine, health education and public health missions of the student health service.

Union allocable and (nonallocable): $46.51 -- this portion of the segregated fee supports the facilities and programs of the Wisconsin Union. This involves the Memorial Union and Union South and extensive social and cultural programming.

GSSF (allocable): $13.42 -- General Student Services Fund (GSSF) funds an array of services for students and student organizations at UW-Madison. Examples include the GUTS Tutorial, the Student Tenant Union, the Community Law Office, Campus Women's Center, SAFEride bus, WLHA Student Radio, the UW-Greens, the Lesbian Gay Bisexual Center, Madison AIDS Support Network, Rape Crisis Center, Men Stopping Rape and Vets for Vets.

System Audit Liability Fee (nonallocable): $8.20 -- Pursuant to a Legislative Audit Bureau review, the 1985-87 State of Wisconsin Biennial Budget allocated auxiliary reserve balances from other UW System campuses to the benefit of the UW-Madison. Repayment is taking place over a period of ten years through funding from this segregated fee.

Intramural (allocable and nonallocable): $7.78 -- this portion of the fee provides funding for the programs and facilities operated under the Division of Recreational Sports General Programs budget. Major facilities supported in this budget include the Southeast Recreational Facilities (SERF) and the Natatorium.

CCTAP (allocable): $4.76 -- The Child Care Tuition Assistance Program (CCTAP) portion of the segregated fee provides tuition grants to students with children to pay for child care costs.

Student Government Activity (allocable): $4.28 -- The Associated Students of Madison (ASM) portion of the segregated fee supports the operation of the UW-Madison student government association and other student group funding that is distributed by the ASM.

United Council (allocable): $.75 -- This fee supports representation activities by the United Council of Student Governments of UW system institutions. Although strictly not a segregated fee, it is assessed with the segregated fee group but at a flat rate of .75 per student without regard to credit load.

WISPIRG (allocable): $.71 -- WISPIRG is a student group activity involved in a variety of public policy issues and supported by a portion of the segregated fee.

6. During the first semester of the 1996-97 school year, each full-time student paid a segregated fee of $190.45 for the first semester. It was distributed as follows:

Health (nonallocable): $85.39

Union (nonallocable): $48.64

Bus Pass (allocable) - $20.08 -- This is a new category for the 96-97 school year. During the spring, 1996 election,

students approved a referendum to charge each student $20.08 for a pass giving free use on all non-campus Madison Metro Transit System bus routes.

GSSF (allocable): $6.48 -- General Student Services Fund (GSSF).

System Audit Liability Fee (nonallocable): $8.12

Intramural (allocable and nonallocable): $10.89

CCTAP (allocable): $4.56 -- Child Care Tuition Assistance Program.

Student Government Activity (allocable): $4.63

United Council (allocable): $.95

WISPIRG (allocable): $.71

7. Students, acting through the Student Services Finance Committee (SSFC) (a committee that is part of the Associated Students of Madison) are able to review the budgets of the units within the nonallocable category. SSFC may make recommendations, reject the budget or vote to increase the budget. However, the Chancellor has ultimate authority over these units and a SSFC vote is not necessarily binding on him.

8. In January and February 1997, the SSFC will review the proposed budgets by entities that receive their funding from nonallocable fee sources. The Associated Students of Madison (student government) may make recommendations to the Chancellor and the Board of Regents, but the students do not exercise control over the budgets for groups funded from the nonallocable category.

9. Items funded through the *nonallocable* category include:

- Debt service
- fixed operating costs of auxiliary operations,
- required reserves
- student health services
- Wisconsin Union
- the first and second year of the Recreational Sports Budget
- University Health Services

10. The Board of Regents has determined that student responsibility for the direct disposition of student fees exist only for the *allocable* portion of the segregated fee. Under sec. 36.09(5), Wis. Stats., students have primary responsibility for the formulation and review of policies concerning "student life, services and interests." At UW-Madison, the chancellor has agreed that "student life, services and interests" includes:

a) The regisuration and regulation of student organizations;

b) Non-academic social, cultural and recreational programs for students; and

c) Those services that are initiated and operated by students.

11. On the Madison campus, the *allocable* fee category funds the following:

- General Student Service Fund (GSSF)
- Child Care Tuition Assistance Program (CCTAP)
- Wisconsin Union Directorate Distinguished Lectures Series
- the third year of the Recreational Sports budget

- the Associated Students of Madison budget
- WISPIRG (Wisconsin Public Interest Research Group)
- United Council

12. The Associated Students of Madison (ASM) has complete authority over most of the allocable funding, in conjunction with the Student Services Finance Committee (SSFC). In addition, some allocable funding may be approved via student referendum. All students are permitted to participate in the process of reviewing and approving allocations by running for election to ASM or SSFC, as well as attending and participating in ASM and SSFC meetings where allocation determinations are discussed. The process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion.

13. Some student organizations that receive funding from the segregated fee receive their funding from the category of the allocable fee called the General Student Services Fund (GSSF). The student groups apply for funding to the Student Services Finance Committee (SSFC). The General Student Services Fund provides a source of funds for those services which provide direct, ongoing services to significant numbers of UW-Madison students. GSSF funds should also contribute significantly to student health, safety or academic success.

14. Applications to the GSSF are open to all registered student organizations, university departments or community based services. Student government activity grants are available only to Registered Student Organizations. To be eligible to register as a Registered Student Organization, a student group must meet the following criteria:

- it must be a not-for-profit, formalized group.

- it must be composed mainly of students.

- it must be controlled and directed by students.

- it must be related to student life on campus.

- it must abide by all federal, state, city and University nondiscrimination laws and policies.

- it must identify a student as a primary contact person for the organization and provide the Student Organization Office with the information required on the registration form.

- it must abide by the financial and other regulations specified in the Student Organization Handbook.

15. Registered Student Organizations can seek funding from the segregated fee in several ways:

- seek funding via a student referendum.

- seek GSSF (General Student Services Fund) funding through the Student Services Finance Committee (SSFC).

- seek Student Government Activity funding through the Associated Students of Madison (ASM).

16. Registered Student Organizations may seek funding through a student referendum. The students vote at an election on whether to approve the assessment for the student group or not.

17. Registered Student Organizations can also apply for GSSF funding from the Student Services Finance Committee (SSFC) for funding from the segregated student fee. If a student organization receives GSSF funds, it may not receive an ASM Operations Grant at the same time. However, it may receive an ASM Events Grant while receiving GSSF funds. During the 95-96 school year, the SSFC distributed $974,200.00 in GSSF funding from the segregated fee to the following organizations:

Student Services Finance Committee (Admin.)	8,400.00
Student Services Finance Committee (unallocated)	11,051.00
SAFEride Bus	165,000.00
Community Law Office	10,435.00
UW Greens	6,905.00
GUTS	56,342.00
Madison AIDS Support Network	26,070.00
Men Stopping Rape	20,136.00
Lesbian, Gay & Bisexual Center	22,042.00
Radio Station	481,673.00
Rape Crisis Center	27,101.00
Student Leadership Program (SLP)	12,815.00
Adventure Learning Program (ALP)	13,050.00
Student Tenant Union	33,340.00
U.S.S.A.	38,000.00
Vets for Vets	7,640.00
Campus Women's Center	34,200.00
Total	974,200.00

Student organizations seeking funding through this method must apply for funding to begin the next fiscal year.

18. Most Registered Student Organizations seek funding from the Student Government Activity Fund through the Associated Students of Madison (ASM). These funds come from the segregated fee. These student groups can apply for *Operations Grants*, *Event Grants* or *Travel Grants*.

Operations Grants - Registered Student Organizations seeking an Operations Grant must apply to the ASM by March for funding in the next school year. New student organizations or groups that did not apply for funding the previous spring may apply for a Last Minute Operations Grant, which is limited to a maximum of $250.00. During the 95-96 school year, ASM awarded 81 operations grants for a total of $30,902.00, ranging from $100.00 to $863.00, with the average grant being $382.00. During the 95-96 school year, the ASM awarded 39 Last Minute Operations Grants totaling 3, 954.00, ranging from $40.00 to $175.00, for an average of $101.00.

Event Grants - Registered Student Organizations may apply for funding of a specific event. These events must be in the Madison area and open to all students. During the 95-96 school year, the event grants ranged from $150.00 to $7,000.00, with the average event grant being $1279.00. During the 95-96 school year, the ASM approved 57 event grants for a total amount of $72,893.00.

Travel Grants - Registered Student Organizations may apply for funding of travel that is central to the purpose of the organization. During the 95-96 school year, travel grants ranged from $150 to $400, with the average travel grant being $255. During the 95-96 school year, the ASM approved six travel grants totaling $1528.00.

19. The total amount of money from the Student Government Activity Fund that the ASM distributed during 95-96 school year for operations grants, last minute operations grants, event grants and travel grants is $109,277.00.

20. After the ASM and the SSFC have approved the disbursements of allocable money, their decisions are sent to the Chancellor and the Board of Regents for their review and approval.

21. Student organizations receiving funding do not get cash or a lump sum payment from the ASM. The organizations must submit a requisition or other appropriate business form requesting payment. An employee of the Office of Dean of Students working with ASM orders the disbursement of the money. Except for membership fees paid in lump sum to WISPIRG, United Council and other multi-campus membership organizations, no money actually goes to the organization itself to pay its bills. Employees of organizations receiving allocations receive their salaries or stipends via the university payroll system.

22. The SSFC can freeze the funding of a student group at anytime.

23. Under sec. 36.09(5), Wis. Stats., the Board of Regents has final authority to approve or disapprove the allocations of funds by the student government.

24. Registered Student Organizations can reserve University facilities for meetings and events. Nonacademic space in the Memorial Union, Union South and many other campus buildings, including recreational, athletic and outdoor campus areas can be reserved for meetings by Registered Student Organizations.

25. The following documents are attached to this stipulation. They are true and correct copies and may be admitted into evidence:

a. Full-Time Segregated Fee Dollar Distributions, First Semester 1995-96

b. Full-Time Segregated Fee Dollar Distributions, First Semester 1996-97

c. 1995-96 Associated Students of Madison Grant Allocations

d. University of Wisconsin System Segregated Fee Allocations by Institution -- Fiscal Year 1995-96, University of Wisconsin-Madison.

e. The Student Services Finance Committee current policy statement

f. University of Wisconsin-Madison Allocable/Non-Allocable Segregated Fee Distribution 1995-96 Annual Budget

g. The University of Wisconsin System Financial Policy and Procedure Paper Number 20-Rev (3), dated June 8, 1987.

h. Student Organization Handbook 1996-97 -- Student Organization Office, University of Wisconsin-Madison, Dean of Students Office.

i. Student Services Finance Committee -- student organization application for 1996-97 GSSF funding.

JAMES E. DOYLE
Attorney General

Dated:_____

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Assistant Attorney General

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JORDAN W. LORENCE
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[ATTACHMENTS NOT INCLUDED]